ECGKSOKM

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

MARK I. SOKOLOW, et al.,

Plaintiffs,

v. 04 CV 397 (GBD)

PALESTINE LIBERATION ORGANIZATION, et al.,

Defendants.

----------x

New York, N.Y.
December 16, 2014
11:00 a.m.

Before:

HON. GEORGE B. DANIELS,

District Judge

APPEARANCES

ARNOLD & PORTER LLP
Attorneys for Plaintiffs
BY: KENT A. YALOWITZ
PHILIP W. HORTON
TAL MACHNES
SARA PILDIS
CARMELA T. ROMEO

MILLER & CHEVALIER, CHARTERED
Attorneys for Defendants
BY: LAURA G. FERGUSON
BRIAN A. HILL
MICHAEL SATIN

THE LAW CLERK: Mark Sokolow, et al., versus the Palestinine Liberation Organization, et al., 04 CV 00397.

Will the parties please rise and make their appearances, beginning with the plaintiff.

MR. YALOWITZ: Good morning, Your Honor. Kent Yalowitz, Arnold & Porter, on behalf of the plaintiffs. With me are my colleagues, Phil Horton, Sara Pildis, Carmela Romeo and Tal Machnes.

THE COURT: Good morning.

MS. FERGUSON: Good morning, Your Honor. Laura Ferguson, on behalf of the Palestinian Authority and PLO. I'm here with my colleagues, Brian Hill and Michael Satin.

And our colleague, Mark Rochon, sends his very sincere apologies. He was called away on an urgent matter recently, and he didn't want to delay the hearing. He sends his apologies.

THE COURT: Sure.

There are a number of issues outstanding that I wanted to address today. I guess our first is if you wanted to update me. I think I'm pretty much up to date, but if you wanted to update me on any recent developments in the circuit. I know that the circuit has granted an extension till tomorrow for the plaintiffs to respond, and I've looked at all the papers, I believe, that were available to me that were submitted.

Mr. Yalowitz?

MR. YALOWITZ: Right. So at my request, the circuit gave me until tomorrow to put in my answer to the mandamus petition. I will give the Court a copy of it, a courtesy copy, so you can see it.

In fact, I have one logistical issue with that, we don't have to do it right now, but at some point today, I just need to raise one logistical issue that I would like your help with in connection with the answer.

THE COURT: Okay. Is that something you want to raise now?

MR. YALOWITZ: It's in your discretion, Your Honor.

THE COURT: Why don't you tell me what it is, and we'll see whether we can discuss it now.

MR. YALOWITZ: Sure. So if Your Honor -- I'm sure Your Honor read the petition. The allegation of irreparable harm, why we can't have a trial, why we can't wait until final judgment, is because these GIS documents are super secret and privileged, and so I just want the Court to see one of them, so that they can understand what it is that the defendants are claiming is so privileged. Those documents are, by virtue of the sort of winding path that we took, being treated as subject to Your Honor's confidentiality order. And I'd like to just show you the one I'm going to give to the appeals court and see if we can get it dedesignated, so my people don't have to file a motion to file the whole answer under seal and go through

that business.

THE COURT: Okay.

MS. FERGUSON: And, Your Honor --

THE COURT: Have you discussed that issue, Ms. Ferguson?

MS. FERGUSON: Your Honor, if I could be heard on our stay motion and also just update the Court on the appeal?

THE COURT: Sure.

MS. FERGUSON: As Your Honor noted, the Court of Appeals has drafted the plaintiffs to file their response to the mandamus petition tomorrow, and it is our position that we are entitled to a stay at this point. This is an issue of incredible importance to our clients. In terms of the stay factors, we need only show a substantial possibility of success on the merits. And I know it's dangerous to read tealeaves, but the fact that the Court of Appeals has drafted the plaintiffs to respond is some indication that they take our petition seriously. They, as you know, could summarily deny a petition without directing a response.

Similarly, they see the urgency of our petition because they granted our motion for expedited relief.

In addition, I know Your Honor does not view the Palestinian Authority as a state, it hasn't been recognized as such by the United States, but it is a foreign government that provides important security services, important safety services

to 4.4 million Palestinians. This case is a huge distraction, and the potential liability is staggering, and, in fact, creates sort of an existential crisis for the Palestinian Authority. It depends, as set forth in the United States brief in Bernstein versus Carey, which was another suit challenging foreign aid provided to the PA, it set forth the fact that the PA is an important partner for peace in the Middle East, the PA is an important ingredient in the two-state solution and the stability that would flow from that, and that it's dependent on foreign aid. It cannot sustain itself with its own revenue, and for this trial to go forward with there being so much uncertainty about whether the Court has jurisdiction, and I mean so much uncertainty about what witnesses will be called, which evidence can come in, that would create a lot of burden to have a 12-week trial coming up within three weeks for an ordinary department, but this is a government that is spread very thin, has limited resources, and has huge uncertainty about who will be called, when they will be needed, and more fundamentally, about whether this Court should even have the case.

And I think this creates an extraordinary situation where it merits caution, it merits letting the Second Circuit rule on jurisdiction before we move forward. I cannot overstate the significance of this to our clients.

THE COURT: Well, I understand your position, I've

read your papers thoroughly. As they say, some of that will be addressed -- let's put it this way: If your client is exonerated, then those aren't issues. If your client is found to be liable, then it's not a particularly compelling argument that your client, the plaintiff, should not recover from your client if they are, in fact, liable on their theories because of the arguments that you've read, and --

MS. FERGUSON: Just to be clear, Your Honor, the financial stakes really go to the issue of whether the Palestinian Authority could appeal a general personal jurisdiction ruling after a trial on the merits.

THE COURT: Well, what makes you think that they would not have the right to do so?

MS. FERGUSON: Well, this goes to the Second Circuit case, Abelesz versus OTP, which involved this claim against the Hungarian banks, which created this huge potential exposure, and in granting a petition for writ of mandamus on personal jurisdiction, the seventh circuit cited to the potential irreparable harm of having a trial that flows from the fact that the huge liability stake created this intense pressure to settle without getting a final judgment.

Similarly, we have the issue here where a potentially large judgment -- although we, of course, think the PA is not liable -- but in the event a jury imposes a large judgment, the cost of the bond would be prohibitive for the Palestinian

Authority.

THE COURT: That either can or can't be addressed at the time.

MS. FERGUSON: Potentially a jurisdictional issue. This isn't some discovery ruling we're challenging. We're challenging the Court's very jurisdiction to hear a case involving the Palestinian Authority based on the assumption that it's at home in the United States.

THE COURT: But this case has been scheduled for trial for months. All of those issues were looming for months, if not years, and it's the inevitability of, as they say, the certainty of a trial date. So those independent arguments aren't any more compelling than they would have been had they been raised months ago or argued that months ago or years ago. We all knew that the end result of this was going to be that there was going to be a trial in which these issues were going to be resolved. Now, to say, well, now a trial is so burdensome, that this alone should compel me to delay the trial, I think that those are -- my attitude is that those are issues that go before the circuit, and the circuit -- I'm not going to guess what the circuit wants to do with this, I'm not even sure if the circuit knows what it wants to do with this, and whether I can say it's a monolithic view on whether or not this is a substantial issue, it is an issue that they have an idea of how they would likely come out or an issue that they

feel is ripe for them to try to determine pretrial as opposed to posttrial.

Those are decisions that are more informed to be made by the circuit, particularly on the posture in which you put the case before the circuit asking them to mandamus the trial date. If they think it's compelling, I'm sure that they will, but I think that my inclination at this point on the motion -- the subsequent motion before me to stay the proceedings is that I was going to -- while I didn't know whether or not the plaintiff was going to respond to your motion, they haven't yet responded to your motion, or I think technically the time to respond has expired, but I didn't really anticipate -- I anticipated discussing with them whether they intended to submit something, but my inclination would be to wait until I received whatever their response is in the circuit and take that into consideration with regard to the outstanding application for a stay, if that's what they wanted to, or for some reason, independently submit something different, but obviously you would not be surprised if the scenario has not changed from when you requested prior to the filing before the circuit to delay the trial, that I'm not compelled that it's the appropriate thing to do under these circumstances, and those are compelling reasons, nor are they irreparable injury that would occur simply because you had to defend a trial, which is a case you've been defending for the last decade.

So it's a little less compelling than somehow that because you want to argue that a change in law should prevent the trial and give you an opportunity to have the circuit determine whether or not to dismiss this case on jurisdictional ground prior to trial. You're in no worse situation than every other plaintiff who have had to try a case under these circumstances and litigate a case in which you've been a litigator for a decade, and now, as you say, until Daimler and Gucci, everyone else found themselves in the same situation as you find yourself, and the only question is whether or not the circuit is going to feel that this is such a compelling issue, whether they -- whichever they resolve the ultimate substantive issue is such a compelling issue, that it warrants an interlocutory appeal prior to trial or it's something that they feel is more appropriate for them to review after a trial, and for the record, and possibly greater development of the law in this area, in this circuit, or elsewhere.

As you're probably not surprised, my inclination is not to grant a stay based on the arguments that you've made, because these are all the arguments that were available and were made prior to your application to the circuit and when we all anticipated that there was going to be a trial in this case.

MS. FERGUSON: Your Honor, I would just like to clarify that when the Court set the January 12th trial date, it

was with the assumption that we would have rulings on a number of these key issues, and --

THE COURT: I gave you specific dates when you would have rulings, and I've stuck to every one of those dates.

MS. FERGUSON: But, Your Honor, even as to the motion for summary judgment, you assumed admissibility of evidence, so in some sense, we didn't get the true benefit of a ruling on a motion for summary judgment because you assumed there was a tribal issue of fact based on --

THE COURT: That's not true. That's the way you characterized it, but that's not what I did. I said that there are issues of admissibility to be resolved, that the posture in which you made the motion, that motion itself, you should -- I don't even know if I said it in the context of the motion, but that the issues that are outstanding with regard to motions in limine, that you should proceed, as most parties proceed in most cases, until your motion is granted, then you should assume to exclude evidence -- both sides should assume what evidence is in.

I'm ready, prepared to move forward on the same schedule as I indicated with regard to what can be resolved today, and the rulings that I'm making and intend to make today, even contemplating -- and we can discuss further motions in limine -- would have any effect on my decision with regard to the summary judgment motion. So that would not change my

ruling with regard to the summary judgment.

MS. FERGUSON: So, Your Honor, just to then respond to Mr. Yalowitz's proposal, we very much would object to plaintiffs' counsel cherrypicking a particular GIS file, and sort of having a unilateral exchange with the Court on what should be unsealed and then submitting that to the Second Circuit as somehow representative of the GIS files. This is the first I've heard of it, but I strongly object to that process.

THE COURT: Why don't we discuss -- I want to discuss your -- particularly I want to discuss the 177 trial exhibits, which I know a number of GIS files are included in, so I am prepared to make some rulings today. As I indicated, once we do that, then we can see whether or not it makes sense for me to weigh in on any particular documents. There might not even be a document necessarily admissible.

MS. FERGUSON: My colleague, Brian Hill, is prepared to address the 177 documents.

THE COURT: Okay. Well, let me do this first.

Mr. Yalowitz, did you want to add anything to that? And then I'm going to start with some basic procedural stuff, jury questionnaire and some other things, that I want to try to give you some indication today before we move forward on the 12th.

MR. YALOWITZ: That's great. I really don't think I

need to be heard on this stay application, Your Honor. We'll give you the answer tomorrow or -- I don't know how late we'll get it in, but we'll give it to you, and you can consider that, if you want to reflect on it for a day, but I think the stay application is meritless, and we really don't need to wallow in this. So let's proceed with your agenda.

THE COURT: All right. Then let's do this. Let me first address -- see how much we can accomplish today. Let me first address the jury selection.

What I propose at this point is: I've gone through the questionnaire and modified the questionnaire. I'm still working on it, I've taken some things out and added a few things. What you should do is you should look it over, and if you want to submit to me a letter either urging that I put something else back in or I take something out, you can do that, but I think that having reviewed the proposed questionnaire and the objections by each side, I think that, in substance, what I have proposed here and the process that I have been attempting to work out with a jury selection will be a process to obtain a fair and impartial jury.

I'm going to give you a copy of what I am still working on, as I say, fashioning as a jury questionnaire and another form that I will explain to you what I'd like to do with.

First of all, this is the timing for what I anticipate

doing: We have a conference, I believe, a pretrial conference, scheduled for January 6th. Hopefully, by that time, at least most of the substantive issues can be finalized, and rulings can be finalized. There are some things that I can give you some guidance on, but might not necessarily have to be totally finalized prior to trial, but we can address that on the 6th and see what else I need to resolve before the 6th.

What I have worked out with our jury panel section is that on the 7th, because we can -- the 12th, there are a lot of trials going to be tried on the 12th, I want to set the panel for this case. We're going to bring in a panel on the 7th that's just for this case. It is probably going to be at least 200 -- two to three hundred, it's probably going to be 200. They're going to be in the jury room.

The way I propose proceeding with regard to the introduction of the jury questionnaire is, I intend to hold a brief court session in the jury room. I will introduce the parties, I will give my preliminary instructions that I standardly do, introduce the parties indicating what this case is about who the parties are, introducing both sides, and telling the jury that we are going to have them fill out the questionnaires and explain to them what the process is going to be. I'm still working on that, but it's consistent with my standard voir dire of jurors, and it's consistent with some of the instructions that you had in the jury questionnaire, which

I'm lifting out because I'm going to tell the jurors personally what we expect them to do.

After I explain to them the case, and what the time period would be, and what the issues are in the case, I will tell them that we have assigned them numbers. Those numbers were randomly generated. I found out the clerk's office randomly generates those numbers rather than putting it in the old-fashioned wheel. So they will be assigned numbers at random, one through two hundred, if we have 200 jurors. What I will do is we will call each juror, they will be assigned the numbers and told what their numbers are.

After I give them the preliminary introductions, the clerk's office will call the numbers from one to two hundred, and jurors will come up and get their questionnaire. So you will have an opportunity to see who that juror is, even though that juror will not be identified by a name or address, and I will explain to them that the primary reason for that is to ensure, when we give them the questionnaire, that they should be totally candid in answering the questions on the questionnaire. It's not unusual to proceed in that manner.

So we will give the jurors the questionnaires. You will see who the jurors are, one through two hundred, on the 7th. We will then let them fill out the questionnaires the rest of the day. Hopefully, by the end of the day, we will have all the questionnaires, and we'll have them -- you should

talk with each other. It may be more efficient for me to just provide the questionnaires to the parties and then for you to agree upon a process and go ahead and copy, and start working on them yourself rather than the Court doing that. Find a vendor who's accepted, who can get you copies, and start dealing with it.

I think it should be enough time to go through that in one day and get back to me by the end of the day Thursday or the beginning of Friday. The preference is the end of the day Thursday. Let me remind myself.

(Pause)

THE COURT: What we're going to do is by the end of the day Thursday, if you got back to me, I would then notify the jury who to call in for voir dire. My intent would be to get at least 25 to 40 jurors who can be voir dired, maybe 50 or 60 to bring in the next day, for Monday, the 12th, and so we would seat those jurors in order, and if there are any more basic questions, and just assure ourselves that they can be fair and impartial jurors and weed out anybody else who there may be a reason why they cannot sit, if there are any other particular specific challenges for cause, and then have 22 jurors who are eligible to sit, and have the parties exercise their three peremptory challenges, if they wish, up to three.

My process would be to have each side give me three peremptory challenges on a piece of paper simultaneously. If

you pick the same person, then you pick the same person, but what I intend to do is to start this trial with 16 jurors. So if we use all three peremptory challenges after we have 22 who are qualified to sit, and there are no peremptory challenges as to those individuals, then I will -- we will seat those 16, we will start the trial with 16. We will -- ten jurors will, at most, deliberate. The rule is in civil cases, no less than six, no more than ten, so I will send the first ten in to deliberate -- who are left of the 16 to deliberate at the end of the case.

Yes, Mr. Yalowitz?

MR. YALOWITZ: May I just raise one issue with the Court on that? I apologize for interrupting.

THE COURT: That's all right.

MR. YALOWITZ: I had sort of a vague memory that there was a change in the rules, and I went back and looked at Rule 48, and Rule 48 says six to twelve, and if they sit, they have to deliberate. The Court's proposal of 16 and 10, so you're going to excuse six at the end of the trial, I don't have a problem with it. I don't know whether -- I just want to make sure that we have a conversation in which everybody looks at the rule, and I don't hear in the Court of Appeals, oh, the judge made a fatal error because --

THE COURT: That's fine.

MR. YALOWITZ: So if the defendants have a problem

with the way the Court is proposing to do it because of the amendments to Rule 48, I think they need to say that, and the Court can consider it, and we can all consider it. If everybody's in agreement that this is the right way to proceed for this case in these circumstances, and the defendants are explicitly waiving any objections they have based on Rule 48, I certainly don't have a problem with proceeding the way the Court has proposed.

THE COURT: Well, I'll look back at the amendments to the rule and see if it has really changed --

MR. YALOWITZ: It was after I went to law school, and so I -- but anyway, it's -- we can look at it, and they can look at it, but I don't want --

THE COURT: If you have a different proposal or you have an objection, I'd like to hear it before we --

MR. YALOWITZ: Right. I just don't want to hear about it across the street.

THE COURT: I understand.

MR. HILL: A couple of points. I haven't looked at Rule 48 lately, but obviously we want the Court to sit the maximum number of jurors allowed by the rule.

With respect to the timing, a couple of points. 24 hours is an extremely short period of time to review 200, 16-page questionnaires with 54 questions each. Is it possible to call the jurors in instead of on Wednesday, the 7th, on

Monday, the 5th --

THE COURT: The answer is no. I've explored all of that with the jury panel, and the best that we can get out of them is Wednesday the -- that Wednesday.

MR. HILL: It wouldn't be possible to do them on Tuesday, the 6th, and do the pretrial --

THE COURT: I tried that. I forget what the reason was. We just physically can't accommodate those jurors on those other days because of other cases.

MR. HILL: In that case, could we start with jury selection on a date other than the 12th, the 13th or the 14th, to give people adequate time? We're talking about a one-day delay. It really is going to jam people to review that stuff in that short period of time.

THE COURT: We can talk about it. Let me finish up and tell you what I'm going to ask you to do, and then we can see why it can't be done in 24 hours. But what I'm going to ask you to do is: I am going to ask you to go through the questionnaires. If they're 200 questionnaires, and this is no different -- I think there were more questionnaires that were done in Judge Koeltl's case in a shorter period of time, but I've given you a form. What I want to know is, I want to know -- and it will probably be fairly obvious -- I want to know, based on the questionnaire, if you think there's a challenge for cause that this person is not qualified to sit.

If you believe so, then just check that off.

And then the two other things I'm looking for: If you think that this person is acceptable for voir dire, that you have no problems with this person, and if this person turns out to be one of the jurors, depending on what you do with your peremptory challenges, then check off the box that it's acceptable for voir dire. It doesn't mean you're accepting the juror for the trial, but there's no challenge for cause. All things being equal, if you had to find somebody worse than this, you would take this person. If you don't have that positive reaction to that person, then don't check either box.

My intent would be to do this: My intent would be to look first for the people that both sides said were acceptable. So if, number one, one of the parties checked there's an objection for cause, and it appears to me -- I'm sure it would be fairly obvious, it's on a piece of paper, I mean it's on the questionnaire, it's got to jump out at some point; or in number 2, both sides leave blank or one side says it's acceptable, the other side left it blank; and number 3, both sides checked off the box acceptable, that's the first person I'm putting in the box for voir dire. I'm going to look for 20 to 30 of those people, in that order, the people that both sides have checked off saying this is an acceptable person for voir dire. So in the order in which they -- the questionnaires are numbered, if I can find 30, 40 of those people, those are the people, in

that order, that are going to be seated in the box, and then we will see whether or not we have to have any more -- if there are any more questions that we need to ask before an individual juror -- before we select them.

To the extent that I don't have enough people that I am comfortable with that are checked off acceptable to both sides, then I will go to people who are acceptable to one side, but not checked off objection for cause. And I will alternate, okay? The first one the plaintiff says, if I have 20 people that you both say is acceptable for voir dire, that's the first 20, and then for Juror No. 21, I will take the first person that I see that the plaintiffs said was acceptable and the defendants didn't check off any box. And then for 22, I'm going to take the first person the defendants said was acceptable and that the plaintiff didn't check off the box.

I think that's the fairest way that, in going through a number of different ways, to get jurors that are acceptable to both parties.

Now, obviously, if it turns out when you exercise your peremptory challenge based on who's seated in the box and where they're seated, you decided you still want to exercise your peremptory challenge, then you're able to do that, or to the extent the person says something when we seat them in the box that gives us an indication that there's a challenge for cause or any other legitimate reason why we should excuse that juror,

if there's a real conflict in time or family illness that's happened over the weekend, that the person just can't do, or something that both sides agree that we should just go ahead, we have plenty of people, we don't need to put this burden on this person who says it's much too burdensome for them to do it. But if they had to do it, they know that that's their responsibility, then we can address those. But that's what I'm looking for back from you.

And I'd like you to take a day to do that. I don't want you to take two, three days to do that. The problem is that we cannot even bring back the two to three hundred jurors on Monday. We just can't physically handle that. So in negotiating with the jury to be able to get to them sometime Friday, maybe I can push them off till Friday mid-day, but they need to contact the jurors to tell them which ones have to be here on Monday, and I only have a limited amount of space and time to be able to notify people that they are to be here Monday to be further examined in voir dire and selected for this trial. So I think by Monday, we're going to proceed with the opening statement and at least hear the first witness on Monday, as I usually do in a trial, if we can.

Look at the questionnaire, figure out whatever strategy that you want to have in terms of how you want to do this, but that's what I am expecting back from you. I'm sure you want as much time as possible to do that, but unless you

can give me a real compelling reason that both sides really can't do that --

MR. HILL: I can try, Your Honor. Let me make a couple of points in response to what you have said, which has been very helpful to understand the process.

To a certain degree, you're asking the parties, without waiving their peremptory challenges, to indicate a favorable view of certain jurors by indicating they're acceptable for voir dire. Obviously that's going to involve us looking at the 200 and coming up with some sort of -- sort for who we would prefer, who we would not prefer, and so on and so forth, the sort of things lawyers do all the time.

Given the amount of data here, we're talking about 50 data points on each juror for 200 people, I'm not very good at math, but that's several thousand data points, and to analyze that in 24 hours, I really do think it's not an adequate amount of time.

The other point is even if we were to do that and get you something on that Friday morning, and you're hoping to tell the clerk's office by noon which ones you're going to select, even Your Honor's process of going through the 200 in the fashion you've indicated of if everybody agrees, they're acceptable, they're on the list, but after that, I've got to make some judgments, three hours on Friday morning may not be enough time for Your Honor to reasonably do that.

THE COURT: I'm going to be doing it in the same time period you're doing it in.

MR. HILL: Your Honor --

THE COURT: My task is simpler than yours because I'm only looking to see if there's somebody who is -- I think that's clearly unqualified to sit. If I think that I see somebody, I assume that you're going to identify the same person from this questionnaire, and I'm not looking to who's acceptable and who's not, you're going to tell me that. My task after that is going to be fairly simple.

But when you say 50 data points, they're not particularly 50 or so relevant data points. Your first two points as to age and whether the person is a male or female, that doesn't take a whole lot of thought on your behalf to try to evaluate that.

MR. HILL: Right.

THE COURT: You can evaluate that even before you get the questionnaires. You can get that if somehow that's a factor in who you're going to pick.

MR. HILL: Some are narratives, some are substantive, and some are free form, so it is going to take time, so I just urge the Court to give us more than 24 hours. I understand you'll take that into consideration.

THE COURT: Well, again, you've got to give me a reasonable -- I'm not sure what it is you're asking for in

terms of time.

MR. HILL: Just for me to read the 200 questionnaires, it may take more than 24 hours.

MR. YALOWITZ: We must be faster readers than the defendants, Your Honor. We don't have any problem with the schedule that you're proposing.

MR. HILL: I think it is a burden on the parties. I think we should have more time.

THE COURT: It's definitely a burden on the parties. It's a burden on me.

MR. HILL: I think we should have -- frankly, there's no reason we couldn't have more time. Your Honor --

THE COURT: There is a reason. As I say, if we're going to pick the jury on Tuesday and begin the trial on Tuesday, I need to know by Friday --

MR. YALOWITZ: Monday.

THE COURT: I mean Monday. Excuse me, Monday, the 12th.

-- I need to know by Friday which jurors we're bringing in here, and I need -- and juries have told me they need to know early in the morning, so they can reach out to those jurors and tell all of those jurors which ones need to come in and which ones don't. And the ones that need to come in will be in the range of 30 to 50.

MR. HILL: My point is that there's no reason we

couldn't start on Tuesday or Wednesday as opposed to Monday and give ourselves that extra time, get you that information Sunday evening, so you can look at it Monday morning, so the clerk's office can call Monday afternoon. It's a one-day delay in the period, but it gives the parties substantially more time to work with the data and make more informed choices. So that's what I am requesting, is essentially a one-day delay to start that.

Your Honor has indicated you don't think we're going to use all the time anyway. I can't imagine that we will, and nobody's going to be prejudiced by a one-day delay with that additional time to evaluate the jurors.

THE COURT: What are you suggesting that we --

MR. HILL: I'm suggesting we give you the stuff Monday morning, you look at it Monday morning, you tell the clerk's office Monday at noon, they make the phone calls, tell people to come in on Tuesday, we start Tuesday instead of Monday. Or we can give it to you Saturday or Sunday, if Your Honor wants to see it over the weekend. We can even give it to you on Friday, and Your Honor --

THE COURT: I'm not sure that it can go beyond Friday. I can consider whether or not you could have until sometime Friday, but I don't think that -- I have to get back with the jury. I don't think we can wait till Monday, and then contact them and have them here Tuesday.

As I say, I don't really see that you're going to make a more informed judgment about this in 48 hours as opposed to 24 hours. There's only so much information to go through.

MR. HILL: Your Honor, I do have one other point on jury selection, if I could make it now. We reflected on what was said at the last hearing of Your Honor's order on the anonymous jury. We would request that the lawyers be allowed to see the key for the jurors. There's no reason --

MR. YALOWITZ: We object to that, Your Honor. We object to that. Your Honor's already made a ruling.

THE COURT: Let him finish, Mr. Yalowitz. One at a time. I hear everyone.

MR. HILL: Your Honor has indicated that there's no reason to believe that the jurors are endangered from the defendants. There's certainly no reason to believe they would be endangered from the lawyers, and I would ask that the lawyers be allowed to see that list, and you can make it confidential, make it attorneys' eyes only, we will return it to the Court after selection.

THE COURT: For what purpose?

MR. HILL: It's information lawyers always get.

THE COURT: It's not information lawyers always get.

MR. HILL: Unless there's an anonymous jury, the lawyers and the public are entitled to know the identity of the people that are serving --

THE COURT: Well, I intend to keep these jurors anonymous by name until the resolution of this trial, so they're not influenced -- unduly influenced by outside factors that should not affect their determination in this case.

MR. HILL: But there's no danger that the lawyers for the parties are going to unduly influence the jurors outside the case. That's something that we're all officers of the court, none of us are going to behave improperly, and I am concerned that if you do tell the jury that either of the lawyers don't know who you are, even though it may not be the Court's intention, that's going to inure to the prejudice of my clients.

My clients are the ones that are accused of acts of violence against civilians, and I am concerned that the jurors are going to feel that they are in danger from our clients because even the lawyers for the defendants can't know who they are. I think the jurors should be told that only the lawyers will have their name and contact information, they will not use it for any purpose other than jury selection, and that it will be destroyed after jury selection is completed.

THE COURT: Well, that's an argument from a lawyer's perspective, that's not an argument from a juror's perspective. The juror isn't going to think about the lawyers if I tell them that they are going to fill out these questionnaires anonymously, and that we're going to proceed anonymously and

not have their names and addresses disclosed, so we can assure that they can be candid with regard to the questionnaire and that there be no chance that there will be any outside influences by any side who might have interest in the trial not related to the parties that would -- that might interfere with their evaluation of this case and deliberation.

I don't think they're going to think about, well, does that mean the lawyers. That's not the way jurors think.

MR. HILL: My point is that restricting the information from the lawyers doesn't address the harm Your Honor is concerned about. You're concerned about outsiders outside of the courtroom affecting the jury, as I understand the basis for Your Honor's ruling.

THE COURT: I'm also concerned about getting for you as candid a response to your questionnaire as you possibly can so you can evaluate it.

MR. HILL: I'm not sure anonymizing the jury will increase candor. I think it may actually decrease candor because when people are not -- they don't sign their name to something, I think there's less accountability there for what they're saying, and I think there's actually a danger that jurors will be less honest if they really do think nobody knows who they are, and they can never be held to account for --

THE COURT: Well, that's not what they're going to think. I know who they are, and if you want me to make it real

clear to them that besides this Court, that I'm not disclosing their names or addresses, and I have assigned them numbers, I can indicate that, but I don't think that -- I'm not sure I understand your -- that makes it less candid than as opposed to more candid.

MR. HILL: As officers of the Court, we should have access to the same information. I think it's going to prejudice our clients if the jurors are told that only Your Honor knows, because even if Your Honor suggests that there's no danger or difficulty, the jurors are going to be concerned about why only the Court can know who they are.

THE COURT: And I am going to tell them why, and I am going to tell them it hasn't -- it's not going to be an explanation about any dangers to the jurors, because that's not why I'm --

MR. HILL: I guess the record reflects my request that we receive that information, Your Honor.

THE COURT: You had something else you wanted to say, Mr. Yalowitz?

MR. YALOWITZ: No, Your Honor. Thank you.

THE COURT: All right. Well, as I've said, we discussed this before, I think particularly -- I don't think that the lawyers are necessarily entitled to that. I have indicated that I would bring the jurors in, and rather than having them fill out questionnaires prior to your seeing the

jurors, that you will be able to at least eyeball the juror, and know what they look like, and use it to factor that in in any way you want to factor it in. The only information that I am keeping anonymous here is the jurors' names and their addresses, and I think that's appropriate to get candid responses from the questionnaire, and it's appropriate to maintain that so that no one who might have an interest in this trial can attempt to improperly influence any of the jurors during the presentation of evidence and during the deliberations or at any point in time prior.

Since I'm not going to sequester the jury, I'm still thinking about ways to get the jurors in and get them out in an efficient way, so that someone who has their own personal agenda in the hallway doesn't get a chance to confront a juror, or follow a juror home, or research information about jurors and confront jurors outside of this courtroom.

We can discuss it further, or if you have suggestions, you can send me a letter once you look this over, but that's my suggestion with regard to how we proceed on the jury questionnaire and jury selection. And I will look at the rules and see if the rules affect the number of jurors and how we proceed if somebody has an objection. If I don't hear an objection, I assume there is no objection to that portion of the jury selection and how juries will deliberate, but I want enough jurors so that if we lose jurors over the course of the

trial, we will still have -- hopefully anticipate we will still have ten jurors that can deliberate. But I'll hear from the parties.

Let's go to the Israeli military court convictions. First of all, I find that the military court convictions are not inadmissible for the reasons that the defendants argue that they're inadmissible. I think judgments of conviction are admissible under the rule, and I see no exception to draw with regard to foreign convictions or with regard to military convictions.

The question really is as to what form it will be admitted. I'm going to address two different circumstances, one, the guilty plea; and two, a trial verdict.

With regard to the guilty pleas involving the attacks at issue in this case, those portions of the hearing transcript that include the guilty plea, the decision, the verdict, along with the indictment to which the defendant pled is admissible. The names and addresses of accomplices and witnesses must be redacted. It is not admissible for that purpose. It is not admissible for the truth that a defendant has accused another of participating in the crime, it's not relevant with regard to naming the individual witnesses. So to the extent that a person was presented with an indictment, that person pled to that indictment, the decision, and transcript, and verdict in which the person pled to that indictment with the names of

accomplices and witnesses being redacted from the guilty plea documents or the indictment that were served as the judgment of conviction for a guilty plea.

With regard to trial verdicts, the trial verdicts themselves -- the bench and trial verdicts are admissible, not the indictments. It is not an instrument that the defendant in that criminal case admitted to the accuracy, or the truthfulness, or admitted guilt to that indictment. What is relevant is what the court determined that individual was found and the evidence supported, the conviction from the court. Again, the names of accomplices and witnesses are to be redacted from all trial documents.

The sentencing records are not admissible. It is not either necessary, nor do I consider it to be an integral part of the judgment itself. The legitimate purpose is to demonstrate that a particular individual was convicted or pled guilty with regard to the attacks at issue, then it is admissible for that relevant purpose, but it is not admissible for the purpose of some accusation against third parties, whether that is someone who plaintiffs want you to contend is an employee or agent of the defendants or some other person. And I think it is not relevant to, and I think it's still important to protect the identity of witnesses who may otherwise be named, and there's no relevant purpose for identifying those witnesses at this trial.

That's my view of that after reviewing -- I reviewed all of the judgments, and all of the indictments, and all of the pleas, and all of the trial transcripts, and that's the conclusion I've reached with regard to this case.

Mr. Yalowitz, did you have a question?

MR. YALOWITZ: I did, Your Honor. I apologize for my oversight, but in reviewing my submission to you yesterday, I noticed that there was one category of convictions that I didn't quite correctly submit to the Court, which is, there are a couple of cases where the defendant says, I admit that the facts alleged against me in the indictment are true, but I don't admit I'm guilty, I just say I did what you said I did, and I am not admitting that I'm guilty.

THE COURT: Okay.

MR. YALOWITZ: I noticed two of those, and I didn't submit to the Court the indictments, which I think support and explain what the defendant is admitting to. And so I'd like, with the Court's permission, to just supplement our list with those two items.

THE COURT: Well, I don't remember whether or not the list that I had, that there was, in fact, an indictment corresponding to the list, but I know I looked at all the indictments that you provided. And I know that my intent in my ruling was to categorically deal with those types of convictions in the same manner.

MR. YALOWITZ: Right. That's my --

THE COURT: So I can look at the indictment, but it wouldn't change my ruling that to the extent that that defendant is pleading guilty to that indictment, admitting those facts that have been presented to them or saying -- and I think most of the language is, they don't challenge, they know what they're charged with, they read the indictment, they're not challenging the allegations in that indictment. To the extent that that defendant is making any such statement, and every defendant made such a statement who pled guilty to an indictment, to the extent that they made that statement, I believe that the trier of fact has the right to see what it is that this person has reviewed, understands that he's charged with, is admitting and pleading guilty to.

MR. YALOWITZ: I agree with that a hundred percent. I just screwed up on what I submitted to the Court. So I'll send a letter --

THE COURT: That's fine.

Does the other side already have it?

MR. YALOWITZ: No, no. I just discovered this yesterday, so I will send a letter to the other side, see if they have a response --

THE COURT: Can you tell me who those defendants are?

MR. YALOWITZ: I'm not sure.

THE COURT: Because I have the list. I went off of

the list that was -- the documents evidencing conviction list. I went through all of those documents.

MR. YALOWITZ: I have to send the Court a letter. I just don't remember. There were two individuals off the top of my head, and then there was a third where there was a summary, and we gave the wrong -- there are three documents. I don't think it's --

THE COURT: Make sure the defense knows what it is, so I can see if there's some other dispute, but this list tells me who pled guilty and who was convicted by a bench trial, by what is characterized as a trial verdict, and what's characterized as a bench verdict. So I went off this list, and as I said, I can't say that when I went through the documents themselves, that I noticed -- I clearly did not notice whether or not there was somebody on the list that I didn't see the indictment, but every indictment that I looked at had the same pattern. And my position was, as I say, if the purpose for which you want the document is because they're accusing some third party, I'm not going to give it to you for that purpose.

MR. YALOWITZ: Agreed.

THE COURT: For the purpose for which you want the document is to indicate that that person pled guilty to an attack that's at issue in this case, and that he either acknowledged it or there was a judgment of conviction after a proceeding in which the Court determined that this person was

guilty of that offense, I think that that is admissible for those purposes. Now, whether there's some other issues or objections to be lodged with regard to the documents themselves, or authenticity, or foundation, or something like that, that's a different question, but with regard to what you want beyond, as I say, I think -- in thinking about what is usually the kind of information that is available in a judgment of conviction, even in a state or federal court in the United States, there is no greater information that is usually provided by a judgment of conviction, and I think the sentencing itself is beyond -- particularly the nature of the sentencing proceedings in many of these cases, is beyond what is the factual determination by the court and is beyond what is the admission of the defendant who pled guilty to the indictment.

MR. YALOWITZ: Right. You and I discussed that issue some time ago, and we reflected on it and did not put the sentencing decisions -- we didn't request admission of those, and we accept the Court's views on that.

What I'll do is, after consulting with Mr. Hill, there are three documents that we need to add or substitute to my December 4th list, and we will send you a letter, and the Court can memo endorse it or whatever.

THE COURT: Unless there's some other specific objection raised independent with regard to those, the same

rule is going to apply.

MR. YALOWITZ: Okay.

THE COURT: It's an indictment, and he pled guilty to it, it's admissible redacted.

MR. YALOWITZ: Thank you.

THE COURT: If it's not a plea of guilty, then it's the verdict itself proceedings, and those also should be redacted with regard to indications about other individuals not the defendant.

MR. YALOWITZ: Okay. Thank you, Your Honor.

MR. HILL: Your Honor, just two points, one substantive and one procedural. I think this should be clear from the discussions here, but as you know, a number of the indictments involve multiple crimes, only one of which is at issue in this case. I'm assuming the other crimes will be part of what's redacted.

MR. YALOWITZ: No, no, no.

MR. HILL: There's no reason for the jury to know that a person was convicted in something unrelated, right?

MR. YALOWITZ: It goes to the state of mind of the defendants, Your Honor.

THE COURT: Well, I'm not sure I agree with the plaintiff that it necessarily goes to the state of mind of the defendant, but I don't see any reason to redact -- if the defendant pled guilty to multiple offenses at the time he or

she pled guilty to the attack at issue, I don't see any reason to further redact it beyond redacting the names of accomplices and witnesses.

MR. HILL: Right. Well, if nothing else, it would be a 403 redaction. Why would we give the jury hundreds of pages of material about crimes that are not at issue in these cases?

THE COURT: Well, I don't know. At this point, I really don't know. The jury might be able to appropriately evaluate it if there's generally an issue as to whether or not this person, in fact, committed this act or committed several acts. I don't know at this point, but I think the probative value of it is not outweighed by any potential prejudice to the defendants.

The question is whether the defendants are going to be tied to the acts that were committed by this individual, and if they're going to be tied to those acts, then it's going to be probative. If they're not tried to those acts, then you have what you would independently have, the person pled guilty to committing acts of violence, and that person is off on his own committing those acts of violence, but --

MR. HILL: Yes, Your Honor, but just to make my point clear, I think there's no probative value to someone pleading guilty to a crime that did not injure one of the plaintiffs in this lawsuit. It doesn't add anything to the plaintiffs' claim that the defendants are responsible for the crimes that injured

them. All it will do is prejudice potentially the defendants and confuse the jury with a bunch of irrelevant stuff.

THE COURT: Well, you would have to identify -- I was not able -- that didn't jump out at me, so I was not able to evaluate that independently.

So if you have a number of those circumstances, and you want to specifically say to me this person was charged with this that has nothing to do with this case, and so we don't think it should be admitted, I'll consider that, but I think that the -- I have a greater fear that a greater redaction might potentially prejudice you or the other side than having the jury -- it's going to be clearly obvious what is being -- is redacted is simply names and addresses -- I mean names of other people who are not the persons at issue here. I have to look specifically at what specific unrelated acts that you say that the person pled guilty to at the same time.

And I assume -- are you talking about just pleas, or are you talking about verdicts?

MR. HILL: Well, it would be both. Some --

THE COURT: How many do you think exist in that category?

MR. HILL: I think with the exception of, perhaps, two people, everyone was convicted of more than one crime and involving crimes other than the ones at issue in this case. So I think this is going to be an issue with most of them, and as

you know from reviewing, some of them go on for dozens and dozens of pages.

THE COURT: No, I understand that. But that wasn't the way the issue was presented to me, so I didn't focus on that. I don't know if you even made an objection on that basis.

MR. HILL: We did make a relevance objection.

THE COURT: No, but I don't think you identified that specifically as the relevance objection that you made, that they were convicted or accused of other crimes that you wanted to keep out. I don't remember that as being part of --

MR. HILL: Well, it is part of our objections, and we would like a ruling on it. We can send Your Honor a letter identifying those portions we think would need to be excluded under this rationale, and Your Honor can adjudicate that.

THE COURT: You should send me a quick letter, and I will review that, or you can discuss it with Mr. Yalowitz and his team first, and if they can agree, then you can just tell me you've agreed, but otherwise I'll look at it carefully.

MR. HILL: Maybe I should start with the procedure. I think we ought to get from the plaintiffs a proposed redacted set that we can look at, and react to and see if we can reach an agreement. If we can't, we can submit to Your Honor our additional issues with what would need to be redacted consistent --

THE COURT: No, I think you better send me right away what it is you want out if you can't agree with them. You should talk to them.

MR. HILL: May I independently see what they propose to offer as a redaction?

THE COURT: Or you can offer redactions yourself.

MR. HILL: I don't intend to offer the documents into evidence, Your Honor.

THE COURT: That's true. But, look, you want an efficient process for doing that, the efficient process, from my point of view, is for the two of you to talk, okay, that's the efficient process, and to see if you can agree or not agree. I think the rule that I've laid out is fairly simple, even you could do that redaction, all right. The names of witnesses -- you know what you want out, okay?

MR. HILL: Yes, Your Honor.

THE COURT: So if they don't want to give you the redaction, then I'll take your redaction. But I expect the two of you to try to work this out and make it simple for me and not more complicated. If they want to do that and wanted to give that to you right up front, so you can raise it with me again, but you're entitled to see it before this trial begins, and they should do the redactions and have those ready -- redacted before the trial begins. If you want further redaction, you better raise that as early as possible, so I can

rule on it.

MR. HILL: I will raise it as soon as I have a chance to look at what the plaintiffs are proposing. So we will try to come up with a schedule to do that.

THE COURT: No, I don't agree with it. If you have further redactions that you know now should be made, then raise it with me, tell me what those redactions are, and show them to me, so I can rule on those right away, so you can know whether or not, if you haven't agreed with the other side, that I'm going to give you additional redactions.

MR. HILL: Yes, Your Honor.

THE COURT: Because I don't intend to give you additional redactions at this point in time. If you want to submit something to me and convince me to do so, the only redactions that you can expect that they're going to make is redactions of the names of accomplices and witnesses, all right? That's the only redaction that I am ordering at this point in time. If you want some more redaction, then you better tell me specifically, and show me what that redaction looks like, and be able to say to me that you asked them to redact it in that manner, and they have refused.

MR. HILL: The other category that occurs to me immediately is the conduct of accomplices. Some of these indictments, as you know, will say Mr. A did A, B, C, D, E, F and G, and that's the whole paragraph, and then the next

paragraph is the defendant did something. So I would think in my hypothetical, that first paragraph about what the accomplice did should come out as well as the accomplice's name.

THE COURT: No.

MR. HILL: But we can raise that with Your Honor --

THE COURT: You can raise it, but I'm not going to grant that application because --

MR. HILL: The defendant --

THE COURT: -- because the defendants are responsible for what coconspirators do and say in furtherance of that conspiracy. So you would not convince me that just because he says I robbed a bank, but Mr. X was the getaway driver, that I'm supposed to both eliminate Mr. X's name and the fact that he had a getaway driver.

MR. HILL: These were not conspiracy convictions, Your Honor.

THE COURT: It doesn't matter whether they were conspiracy convictions. Even if it's not a conviction, the question is if he is committing the crime with others, and he is admitting that this is the manner in which the crimes were committed, that there's no reason to do a further redaction and make it sound like, unfairly and inaccurately, that he's committing the crime by himself when he's admitted that he's committed the crime with others. So I'm not likely to grant that application, but if you think you have a compelling

argument to make that somehow he's supposed -- I'm supposed to take out when he adopts the manner in which the crime was committed, I'll hear it, but it's not likely to convince me.

MR. HILL: Well, we will include that in the letter. Thank you, Your Honor.

THE COURT: So that's the nature -- I just want to make sure you understand the nature of my ruling with regard to that.

Let me go specifically to the custodial statements. I'm going to rule that any self-inculpatory statement of an unavailable witness is admissible under 804. Statements of unavailable witnesses inculpating third parties consistent with the ruling I already gave you is inadmissible. It is not a statement against interest accusing a third party. So to the extent that you have -- consistent with my other rulings, to the extent that you have custodial statements made by individuals who are admitting their participation or their responsibility for the acts at issue, those statements can be admitted at this trial as statements against that person's interests, but I will not allow statements accusing third parties in those -- in interrogations or in those admissions by the witness accusing third parties of committing an offense. It doesn't -- a person doesn't have the same incentive to report the same rationale that applies to the reliability of the person saying something against their own appeal interests

or other criminal interests. The same rationale does not apply to accusing a third party because it doesn't have that same degree of reliability.

MR. HILL: Your Honor, this type of document will have the same issue with respect to other crimes, and so we'll submit a letter to Your Honor on that as well.

THE COURT: As I said, the only issue that I think is appropriate to keep out is accusing a third party of committing -- naming a third party that -- I assume the only relevance would be is to try to name a third party that the plaintiff is going to try to say is either engaged in or an agent or an employee of the defendants. To the extent that the guy says I did it with ten other people, I don't think that that's inadmissible. To the extent they say I did it with ten other PLO people, I think it's inadmissible. It doesn't -- the rule -- it's not a statement against his interests, that's a statement against their interests.

I don't know of any analysis that would say to me that the fact that a witness says he committed a crime with other people or he describes activity that he didn't personally do, but that his accomplices did, that somehow that activity is somehow inadmissible, I don't know what would be the rationale for that, the legal basis for that kind of ruling. That's not -- as I say, a person's confession is robbing a bank, and he says, you know, I had a guy outside waiting in a getaway

car, I don't know why it's inadmissible for him to say that he had an accomplice within the getaway car or why it necessarily would be prejudicial to the defendant unless they can tie the person in the getaway car to the defendant. So my ruling is limited in that manner, and I will consider whether the application you have with regard to that, but I've considered those issues already.

MR. HILL: Your Honor, one more note. I think with that ruling, it may have triggered what your Honor referenced in the summary judgment order, which is if certain evidence is not admissible, certain claims may not proceed to trial. We'll go back and look at that, and we'll send you a letter if we think that's the case.

THE COURT: No, I understand that.

Yes, sir?

MR. YALOWITZ: So in that regard, Your Honor, as I understand it, I think really what we're dealing with here is the Hebrew University bombing and Abdullah Barghouti, who was the bomb maker, and his -- so that's four decedent plaintiffs. His confessions say stuff like, Jibril Rajoub released me from prison, and it doesn't really matter that it's Jibril Rajoub instead of some other jailer who's a PA employee --

THE COURT: Well, why is that a statement against his interests?

MR. YALOWITZ: Because he's -- okay. Well, that's a

bad example.

THE COURT: Yes, it is. That's not admissible or relevant for any purpose.

MR. YALOWITZ: Fair enough.

Marwin Barghouti kept me in a safe house. So he's saying I was kept in a safe house, I was harbored by this guy, and he asked me to give him bombs, and I gave him bombs. So he's incriminating himself, but he's also incriminating a key employee of the defendants.

THE COURT: He can't do that. If he wants to do that, he should be sitting in this jury box under oath. If you don't have him, if he's an unavailable witness, you can put in whatever statements are against his interests. They're not admissible to put against someone else. That's the rule. That's the rule, and I'm sticking with that rule. He cannot accuse -- he has no -- it has no degree of reliability for him to accuse a third party. He could have accused you just to deflect -- because they say during the interrogation, well, we know you did it with others. It does not fall under the rule that you're offering it under as a statement against interest. He can say that I was kept at a safe house and your statement, if your document says he confessed to being kept at a safe house by John Doe, then you redact the John Doe, and he's confessed to that crime. He says I committed it, I got away with it, that he was helped by others. It is not admissible,

an out-of-court statement accusing any defendant in this case or any person associated with the defendant.

MR. YALOWITZ: I understand the Court's ruling. I want to reflect on it.

THE COURT: Sure.

MR. YALOWITZ: If I think it matters -- I just want to reflect on it. If I think it matters --

THE COURT: I'm sure it does matter, but whether it's admissible is a different question. You'd rather have it, they'd rather you not. The question is do the rules allow it.

MR. YALOWITZ: Right. Look, if I think I have enough to go to the jury, and -- then fine, we'll just move on, but if I think it's really important, and I have a good reason to ask you to review it, we'll come back to it.

THE COURT: Then we will review it, and if you say to me that's your only evidence rather than being the issue of summary judgment, it's an issue of proof at trial, and I am going to enter a directed verdict for the defendant because you don't have that proof to offer at the trial. That's your only proof tying him to the event.

MR. HILL: Your Honor, we will send a letter, and I think we actually would be entitled to judgment in that instance before trial. We would obviously be prejudiced if the jury hears in opening about events that they're never going to have to rule on, so --

THE COURT: As I say, sometimes the prejudice is to the other side when that happens.

MR. YALOWITZ: Yeah, that's for sure.

MR. HILL: I know --

THE COURT: So it makes it easier for you to win when a party gets up and promises some things that they can't deliver. So you should evaluate it. If it's clear to you -- and, again, that's why there's no way I could have resolved summary judgment this way, doing this kind of analysis, even though I know what the general rule is. If you think that this ruling means that there is going to be no evidence going to be presented at this trial, and they agree that there's going to be no other evidence presented at this trial, then I'm not going to waste anybody's time. But if they say they have some other evidence that they think, either circumstantially or otherwise, that the jury should still hear the case, then that's a different question. But that's my ruling, and you have to evaluate how it affects whether or not there is going to be other evidence that is going to meet all of the elements of the claim.

MR. YALOWITZ: Understood, okay. I am just putting it out there because we have to think about it and look at it.

THE COURT: All right.

I'm not sure -- just to briefly touch on this, and then I want to go to 177 trial exhibits. I wasn't quite sure

how you intended to handle what you characterized as defendants' objections to plaintiffs' English language translations. And before you even respond, let me tell you what my basic view always is: If you don't like their translation, then you should get your own. That's the way the rule works. If you think their translation is wrong, then you should provide your own translation. That's the way it happens in any case. It happens in a criminal drug case where two people are talking on the telephone, and there's a transcript of the phone conversation, and an interpreter says it means one thing, and the other side says, no, it doesn't mean that. Or even if it's in English, that you say the person said X, and you heard X, but somebody else listened to it and heard Y, then you get your own transcript, and you proceed, you say that's not what was said, they didn't say X, they said Y, and the jury makes their own determination that either the evidence as it was presented to them or the reliability of the experts who say they're going to testify about they're making accurate translations. I don't know whether the translations are accurate, I don't speak either language.

And also with regard -- the only thing that I thought was a legitimate objection by the defense was, to the extent that there were -- I'll call them parenthetical commentary about what was being translated, I agree with you that to the extent that that is not what the person said, but to the extent

that that is the expert's explanation about what the person meant, it's not -- it's out, it's out. You give us the word, you give us -- your translation, give us the closest translation of what would be the statement.

You can't say the guy said I went to my house, but in parentheses say, well, when he said house, he really was referring to home, and he really meant home instead of house. No, you give a translation of what the -- not necessarily the word-for-word translation is, but the meaning of the substance of the phrases that are used by the witness, so that I can put the words in another language that were uttered by the witness, I can put the translation in the witness' mouth.

So if I can't put the translation word for word in the witness' mouth, then I'm not going to accept some sort of description that's parenthetically within the translation. It's got to be what you would say is an accurate translation of what the person would be saying if they were talking in English, word for word, all right? That's what you have to do.

So to the extent that you don't have that, then you better either redact it or you better redo the translation or the document without it. But to the extent that the defense is simply going to argue that this interpreter is not giving an accurate translation, that's dueling interpreters, as far as I'm concerned. There's nothing else I can do about that.

MS. FERGUSON: Your Honor, just to be clear, for the

roughly 177 documents that we produced, we have gone through that exercise and have provided the plaintiffs with particularized objections that say our translators say it should be this, the date's wrong, the name is wrong, the number is wrong. So we've done that exercise.

THE COURT: Okay.

MS. FERGUSON: Our problem is that there is about -- there's hundreds, and hundreds, and hundreds of other exhibits that they've produced that are foreign language newspaper articles, and hours and hours of videotape, and numerous exhibits that are in a foreign language, and we have no idea -- our position is they're rank hearsay, they shouldn't come in, we have no way to authenticate them.

THE COURT: But that's a different issue. I'm just dealing with the translation issue. It still doesn't change the rule about the translation. If you think it's an inaccurate translation, I assume that's not because you've translated it, I assume that's because you've gotten an expert who understands the language and translates it differently, and therefore, you should present that to the jury and let them make their own determination of the reliability and acceptability, just like any expert, whether they should accept your expert's opinion or their opinion.

MS. FERGUSON: I understand, Your Honor. I'm just talking about the process moving forward for particularizing

objections to exhibits that the plaintiffs have produced in the absence of any certainty about what exhibits are actually coming in. It's hugely expensive to engage in this exercise. We just got new exhibits the other day from the plaintiffs, and I had an estimate run, it was $12,000 to get just a small subset of their foreign language exhibits translated.

So we need some sort of guidance on what's coming in before I incur a substantial expense of the client to --

THE COURT: Well, then, you don't have a current objection. I'm only dealing with your current objection. I'm giving you as many rulings as I can early on, so you can make a judgment. And you're right, some documents are not going to be admissible, and others are, but if you have an objection now to the translation, and you think that that translation is of import to the jury's determination in this case, then I assume you presented that to me. I'm not sympathetic to the fact that you don't know if there's something that's mistranslated that you've had for months or years that you now want to try to figure out if you're going to try to object to because somehow the translation is inaccurate and prejudicial to you. If it's inaccurate, and it's important to you, I assume that you already have an expert who has said that and told you, you better not let the other side say that this is what it means because it's going to hurt you, and it doesn't mean that.

Now, if the person said, you know, I own a cat, and

you say the translation should be I own a dog, that's your decision whether or not that's important to you or not in this case, and you want to raise that with the Court. But you know this case much more intimately than I, so you know what is important to keep out, that you don't want before the jury, and what's important -- not what's unimportant. So I can't give you any further guidance than that, than to say I will give you rulings with regard to -- as I'm consistently doing, with regard to the nature of the exhibits. But it's unreasonable for you to think that I'm supposed to give you a ruling as to every single exhibit that you or the plaintiff might want to offer at trial, prior to trial, so then you can make a decision whether or not you want to object to it or you want to do the work to find out what it really says. I'm doing the best I can, so -- if you give me another two years, it's going to be better than this.

MR. HILL: Your Honor, in that regard, I had another request, and it's the following: If we are going to proceed to trial in early January, we should get a list of the order of the witnesses that the plaintiffs are going to call. Obviously the plaintiffs' lawyers know what that's going to be. At the same time, we should get a list of what exhibits they anticipate offering with each witness.

THE COURT: And you should provide them the same thing.

MR. HILL: Absolutely. The reality is the lawyers are preparing for trial, the lawyers know, and it's going to be most efficient at trial if the other side --

THE COURT: If you want to agree to a time that both of you are going to exchange that, then you should do it that way.

MR. HILL: If we did it soon, that would help, Your Honor, in terms of prioritizing pretrial rulings on the admissibility of documents.

THE COURT: Not particularly. No, I mean I only got so much time here. I'm working every day on this case.

MR. HILL: And that's -- frankly, to return to the theme we started with, that's why we ought not to proceed on this date. When you set the date in March, you indicated that you would rule --

THE COURT: Why am I not surprised that you used that as the excuse? Look, I told you what we were going to do, and everybody said that that was a perfectly appropriate time frame. And I knew it would demand a great deal of my time and a great deal of concentration from you. I'm doing my part.

MR. HILL: I'm sure you are, Your Honor.

THE COURT: If the circuit wants to stop the trial, that's fine, but, no, you're not laying your record to make it appear that somehow you're getting late rulings that are making it difficult for you to prepare for trial. No, I reject that

out of hand, so don't try to lay that kind of a record here.

MR. HILL: Well, Your Honor, I do want to, just for the record, make the following statement: At the hearing in March, when you set January 12th as the trial date, you indicated that by the last pretrial hearing, November 20th, which was originally to be the final pretrial hearing, that we would have rulings on evidentiary issues, so we could prepare in an orderly fashion for the trial to commence on January the 12th. That schedule has slipped, and that has been, in my view, to the prejudice of the defendants.

THE COURT: Absolutely not. There's no record that indicates that you were promised that you would have some kind of ruling that would put you in some sort of unprejudicial position, to be prepared for trial, that we didn't discuss and this schedule isn't me. I'm not going to let you lay that record. You can try that in the circuit, if you want, but the fact is, we set trial back in March, all right. All of these issues were going to be resolved, and, quite frankly, some of these issues, you're not even entitled to a resolution prior to trial. I'm giving you as early a decision on these issues as possible. If you're not ready for trial, that's your fault.

Now, if you want to delay the trial because of jurisdictional issues, I can accept that argument, but if you're going to try to now word it on the record that somehow you're not ready for trial because of something that either the

other side did or something this Court did, that's a false impression to try to put into this record. There is no basis for you to make that argument, that somehow you should not have been prepared for trial on January 12th, and you didn't have a full opportunity to be prepared for trial for January 12th when this trial was set back in March. You can save that discussion for the circuit, because that's not persuasive here.

You never laid any objection to this schedule. Not a single objection.

MR. HILL: Your Honor, we did object before the last hearing.

THE COURT: No, you did not. You did not object to the schedule as I told you that we were going to lay out for you to be ready for the January 12th date. You did not -- you never objected to that schedule.

MR. HILL: Before the last hearing, we filed a letter suggesting the case was not ready for trial because the schedule in March had had final evidentiary rulings by the last hearing November the 20th, which was originally supposed to be the final pretrial conference. We're still not to the final pretrial conference.

THE COURT: Is it your recollection in that letter that you asked that this trial be put off because --

MR. HILL: Yes, Your Honor.

THE COURT: -- you were not prepared for trial?

MR. HILL: Yes, Your Honor, we did.

THE COURT: Okay. Well, I suggest that you look at the letter, and then you can quote me that language in that letter.

MR. HILL: Let's see if we can get it for Your Honor.

THE COURT: Because that's not my recollection of the way you fashioned artfully that letter, and that's the only way I can describe it.

You said a lot of things needed to be done before trial.

MR. HILL: Yes, Your Honor. The November 14th letter says, "As the Court forecasted at the December 16th status hearing, the January 12th trial date has proven overly ambitious in light of the sheer volume of pretrial issues pending before the Court, including the following," and then we listed them.

And then on the last page of the letter, which is record number 639 at page 3, it says, "At the March 4th status hearing, the Court preliminarily set the trial to begin January 12th because that was the first opening in the Court's calendar for a ten-to twelve-week trial that did not have time over the holidays. The Court made clear that the January 12th date was contingent on the resolution of pretrial issues, including motions for summary judgments and motions in limine."

Defendants recognize the Court is working diligently

to resolve the numerous merits and objections. As the Court noted the most recent status hearing setting the case preliminarily for January 12th, 2015, was an ambitious schedule because the Court has a significant amount of paper to go through before it can give the parties final decisions on most of these motions."

Then the next paragraph says, "When, at the March 4th status conference, the Court set November 20th as the date for the pretrial conference, the Court anticipated that all pretrial matters would be resolved by November 20th, which would give the parties," and now this is a quote from the transcript, quote, "enough time to finalize their preparations for trial, even given the holidays in between.

"The trial is now tentatively set to begin in about two months, and through no fault of the Court, numerous important issues remain unresolved, including the claims and defenses that will be tried, what instructions will be given to the jury, how many trials there will be, what witnesses will be permitted to testify, and which exhibits and deposition testimony will be admissible. Added to this uncertainty is the substantial logistical hurdle associated with the fact that most of the witnesses are located overseas, and substantially lead time is needed to arrange for their appearance in New York."

And then the letter back from Mr. Yalowitz --

THE COURT: Okay. So where in there did you ask me to put off the trial?

MR. HILL: Mr. Yalowitz said, "I write in response to defendants' letter earlier today asking that the Court postpone the commencement of the trial in this action."

THE COURT: Say again?

MR. HILL: This is from Mr. Yalowitz the same day. "I write in response to defendants' letter earlier today asking that the Court postpone the commencement of trial in this action."

THE COURT: Where in that letter did you ask me to postpone a commencement of the trial?

MR. HILL: We said we wanted to discuss with you at the November 20th hearing whether or not we could proceed on that hearing. Your Honor took the bench and indicated we would proceed.

THE COURT: Right. So nowhere in that letter did you ask me to postpone the trial.

MR. HILL: I believe we did, Your Honor. The plaintiffs had that understanding as well. I'm --

THE COURT: Is it your position that you're not prepared for trial?

MR. HILL: Your Honor, we don't know what witnesses --

THE COURT: Is it your position you're not prepared for trial?

MR. HILL: Yes, Your Honor, we cannot prepare for trial not knowing what witnesses are going to be admitted, what exhibits are going to be admitted, if they're going to be redacted in what form they're going to be admitted, and we're now less than a month from the trial date.

THE COURT: Okay. Well, as I say, I've been working diligently at it. I assume you have, too. So let's move forward, so you can make sure that you are ready. There's nothing in that letter or in what you said now that would be any legitimate reason that I should adjourn this trial because you're not prepared for trial. To say you're not prepared for trial is disingenuous.

The next thing is that -- so that's how I'm going to deal -- I don't have any issue with regard to translations. If you have a different translation, then you should provide that different translation and argue to the jury, convince the jury, that your translation is relevant and is more accurate than their translation.

Now, the admissibility, I don't know what the issue is with regard to admissibility of plaintiffs' chart summarizing evidence. To the extent that those charts become -- accurately reflect the evidence before the jury, a summary witness can always testify to those charts. The only chart that I have before me is a chart about -- let me just address the chart dealing with media material.

I don't see why this chart is admissible at all. It's not likely it's going to get in. It has absolutely no -- it does not make it more likely than not or go to circumstantial evidence that the defendants were involved in the terrorist activities at issue. We know what the rhetoric is, and we know what the heightened rhetoric is in the region with regard depending what political view one may have with regard to the circumstances, what you characterize as the Israeli-Palestinian conflict. The fact that people have heightened rhetoric about it or cite it -- and I am not even sure who you're supposed to be citing in most of these articles -- has absolutely no probative value with regard to the issues that the jury has to decide here and is not likely that I am going to admit simply -- I'll just take one example. Fox News, where it is quoted that -- and I am not even sure who is supposed to be making the quote, it doesn't matter -- you get the Israelis out of the West Bank in Gaza, and you will have a peace agreement. It has absolutely no probative value as to whether or not they were involved in the terrorist acts at issue. A person involved in the terrorist act or a person not involved in the terrorist act are just as likely to have made that statement. That's the only way I can characterize it.

So to the extent that that really -- now, those are two different issues, though, because there are other charts, too. To the extent the charts do reflect evidence that was

admitted before the jury, and if there's a summary chart, summary charts are admissible. If you have someone who wants to come in and say I made this summary chart, and it's based on this evidence, and this is the evidence that's before the jury, that's fine, I have no problems with that. But to the extent that it does not accurately represent evidence that is independently before this jury or that -- as I say, with regard to the first chart, simply a chart of statements being made about the Palestinian-Israeli conflict in general, no, that is not admissible to even prove circumstantially that it involved terrorist acts.

The summary of defendants' payments to convicted nonemployee terrorists, I agree that unless -- I think the major objection is just the type more than anything else. Obviously if the evidence comes in that through the payment, water payments and other payments in a climate that these are payments that were made, and those exhibits would be admissible, then somebody can summarize that and indicate that at the trial before the jury that those documents summarized this, and this is an accurate summary of those documents that's reflected in evidence.

Now, whether or not it's appropriate to title it "Summary of Defendants' Payments To Convicted Nonemployee Terrorists," I don't know -- you can probably pick a more neutral accurate statement as to what this really represents.

MR. YALOWITZ: I assume the objection is to the word "terrorists." It's accurate, but we can find a different word. That's what these people are convicted of. I don't know there's a --

THE COURT: But that's argument. That's not --

MR. YALOWITZ: Understood. But I don't think there's a genuine dispute that's what they did, but I can pick a different word.

THE COURT: Is there any other objection?

MR. HILL: There is. It also meshes the defendants together. We have two separate defendants here, so it doesn't accurately summarize or allow the jury to distinguish between which defendant is engaged in the conduct that's at issue.

THE COURT: Well, I don't have a real problem with that because it doesn't say -- it just says these are payments that were made, it doesn't say who made the payments. The evidence said who made the payments. But if they want to say if these are payments being made by the PA, then they can put it in the title.

MR. HILL: That's my point, it should accurately reflect, if the evidence comes in, which defendant.

THE COURT: Is it your position that to accurately reflect that, it would need to say that these are payments made by the PA as opposed to the PLO?

MR. HILL: I would have to go back and check. I think

that's right.

THE COURT: I don't know if you have a big issue with that.

MR. YALOWITZ: I think that is correct. I think the money flow comes from the PA, and we prepared those charts before Your Honor issued the summary judgment. Obviously, the alterego issues and agency issues are going to be for the jury in the trial, but I don't have a problem saying payments from the PA to nonemployee --

THE COURT: Convicted nonemployees.

MR. YALOWITZ: Yeah, I don't have a problem with that.

THE COURT: That's accurate. Then you can argue what you will. If you want to use the word terrorist ten times, that's up to you in your argument, but that's --

MR. YALOWITZ: Right.

THE COURT: It's a sensitive issue.

And then the same thing with the pay and promotion to -- and you say defendants' employee terrorists, obviously they believe that that is a charged phrase, and if you want to say PA employees, then that will be an accurate statement of what that chart is.

MR. HILL: Again, there's an issue about whether someone in prison is or is not an employee.

THE COURT: Well, if the evidence comes in that they were employed by the PA at a particular period of time, then

the chart accurately reflects the evidence that they have put before the jury. Now, whether you want to dispute it or not is a different question, but it seems to me that as I went through the 177 documents, you don't really -- most of your argument is not that you're denying that the evidence reflects that these -- these documents reflect that these people were employed at some point by the PA. Most of this -- I don't understand that you are even attempting to legitimately dispute that.

MR. HILL: Well, there are instances where the documents are incorrect.

THE COURT: But that wasn't my issue. My issue is that I sought employment at Rikers that you produced. I assume you're not taking the position that those employment records are false.

MR. HILL: Some of them are incorrect.

THE COURT: You have identified no document that you say that you produced that falsely indicates that the person is employed by the PA when you say that the true fact was that they were not employed by the PA.

MR. HILL: Some of them do, Your Honor.

THE COURT: Okay. Well, you have not identified any of those to me.

MR. HILL: Well, we can do that very easily.

THE COURT: Well, if you want to, but I'm ruling on

what you presented to me, and you say -- and I will get to that in a second, and maybe we can just go ahead and segue into that. I think we really don't need to say much more about the chart at this point in time. Let me get through the 177 documents.

With regard to the 177 documents, it seems to me that you were talking about an objection on foundation grounds to 46 of those. Am I accurate?

MR. HILL: I think the objection by foundation, you mean authenticity in the sense that either it's a document we didn't produce for which there is no witness that will say what it is or it's a document where multiple --

THE COURT: Well, there were three of those.

MR. HILL: Yes, Your Honor.

THE COURT: There are three documents you didn't produce?

MR. HILL: Correct.

THE COURT: I understand that. That's a separate category.

MR. HILL: Right.

THE COURT: But my understanding is that you identified 46 documents that you said that you had an objection to foundation.

MR. HILL: Yes, Your Honor.

THE COURT: Okay. I went through the 177 documents.

My position is this: To the extent that the plaintiffs requested certain documents, and in response to that, you produced those documents, that that authenticates the documents, meaning the documents are what they purport to be. If they asked you for employment records, and this is what you produced in response to that, then that is a sufficient foundation for its admissibility as employment records.

Now, if you want to dispute whether or not, in fact, any particular document is an employment record, that's fine, but that goes to its weight, not its admissibility at this point. These are the documents that you produced, and you produced these in a manner in which it was represented that it was responsive to a request, and to the extent that that's the case, that is a sufficient foundation to admit the documents.

Now, you can try to figure out whether or not you can come to some understanding or you just want to -- if you want me to have them go through the process of demonstrating that you, in fact, produced the documents in response to certain requests and put that before the jury or we can agree to some other way that you can -- if you want to, you can stipulate that the documents come in, or I can just note your objection for the record, and then go ahead, and admit the documents on that basis. But I find that to the extent that you have produced these documents, there is no foundation objection. Those documents are what you represented them to be.

Now, whether or not they're accurate, that's not what they're purported to be. They want to argue that they're accurate, you may want to argue that they're inaccurate, but that's not a foundation issue, that's a weight issue. And what the jury -- the question is, are these GIS documents, are these employment documents, are these -- there were four or five categories -- they were martyr documents, martyr files, and there were --

MR. YALOWITZ: Administrative prisoners.

THE COURT: I have employment records, I have ministry of detainee records, I have martyr files, I have GIS documents, and I have military or finance accounting statements. These were requested by the plaintiff, and were produced, and represented to be these kinds of documents.

MR. HILL: Actually, Your Honor, they were not represented to be those kinds of documents.

THE COURT: Well, they were produced in response to those requests.

MR. HILL: The request was any document with Mr. X's name on it, including, but not limited to, several categories of documents, and we --

THE COURT: So what are you disputing with regard -- are you disputing that these are employment records of the PA?

MR. HILL: Well, it depends on the jury, obviously, but --

THE COURT: Are you denying that these employment records that were kept by the PA?

MR. HILL: No, these are documents kept by the defendants. Some came from different defendants, some came from the PA, some came from the PLO, and the objection on foundation with respect to authenticity is the assembly of the documents. We've got document A and document B put together into a single exhibit, and they don't go together. That's the authenticity objection to that particular exhibit.

THE COURT: Okay, I didn't understand that. That's fine and dandy. If they are separate documents, and it's clear that they are separate documents, then they can be marked as separate exhibits, but that's not a foundation objection. If you want to say that that's -- the question is, is it what it purports to be? It's supposed to purport to be a record that reflects the employment of certain individuals by the PA or PLO. If you say that that's not reliably what it is, then you're going to have to explain why you produced it, but I don't understand that to be your objection. Your objection is that somehow, you have two separate documents, it's not the same document?

MR. HILL: Yes, that's the authenticity objection. It's not very complicated.

THE COURT: Well, then, it's not an authenticity objection, you just want them designated as separate exhibits.

MR. HILL: Well, to put it as a single exhibit, as a single document, is inauthentic because it is, in fact, separate documents.

THE COURT: So you have no other objection other than you want the documents to be admitted separately because they're not, in fact, one document.

MR. HILL: Well, then there's the category of materials that we have that didn't come from us. So we object to the authenticity of third-party documents that our client --

THE COURT: I'm not sure what that is because I don't think you represented to the plaintiff, when you produced any of these documents, that these are documents that you have that you got from third parties. Did you?

MR. HILL: Well, it's apparent on the face that they're documents from third parties.

THE COURT: Like what?

MR. HILL: Like the Israeli Military Corp., the International Red Cross or newspapers.

THE COURT: Okay. But when you say "newspapers," what --

MR. HILL: Newspapers.

THE COURT: In what files?

MR. HILL: In the files of the General Intelligence Service.

THE COURT: But why is that an authenticity -- that's

not an authenticity.

MR. HILL: It is because they're --

THE COURT: No, listen. If it is represented to be a collection of newspaper articles collected by the GIS of the PA, that is what it is, but that's what it's offered to be. Now, that may not deal with whether or not what purpose it's being used for, but that doesn't make it not what it purports to be. That's all it purports to be. Nobody purports to say that the GIS wrote these articles.

MR. HILL: No, no one purports that. But whether or not that is, in fact, a newspaper article is if the plaintiffs want to offer it to prove that it is a newspaper article, they would need to lay a foundation.

THE COURT: Are you denying that it's a newspaper article that was gathered by the GIS and contained in the GIS file?

MR. HILL: Yeah, we object that --

THE COURT: You deny it's a newspaper article? You have proof that it is not what --

MR. HILL: That's not the burden, Your Honor. The burden --

THE COURT: No, I'm asking you -- sir, listen to my question. I want to know whether or not there's a genuine dispute about the authenticity of this document.

MR. HILL: Yes.

THE COURT: If your argument is simply, I'm making a technical argument that I want to hide behind, I understand that, but I'm asking you: Is there a genuine dispute that this document is what it purports to be?

MR. HILL: Yes.

THE COURT: And it purports to be a newspaper article that was gathered by the GIS and collected in the GIS file. It's not offered to be anything more than that. You deny that that's the case?

MR. HILL: We deny there's a foundation for that to be --

THE COURT: Are you going to listen to my question and answer it? If you're not going to answer my question, then just tell me, I won't waste my time.

You deny that this is a newspaper article that was gathered by the GIS and put in the GIS files even though it was not written by the GIS? Do you deny that? Yes or no.

MR. HILL: It's a compilation --

THE COURT: Yes or no?

MR. HILL: I deny part of it.

THE COURT: Which part do you deny?

MR. HILL: I don't deny it's in our file, I deny it is a newspaper article.

THE COURT: You deny -- you have reason to believe it's not a newspaper article?

MR. HILL: Your Honor, it's their burden --

THE COURT: I didn't ask you that. I didn't ask you that. I'm trying to figure out whether you have a genuine dispute as to its authenticity.

MR. HILL: Yes, Your Honor.

THE COURT: Because you have evidence that this is not what it purports to be?

MR. HILL: No, Your Honor, I don't have that evidence.

THE COURT: Okay. Then you have no way to dispute that. You're just saying it's their burden. Is that your argument?

MR. HILL: I'm making an objection that they haven't satisfied the burden for a different --

THE COURT: You're not disputing -- you don't have any reason to believe that it is something other than what they're representing it to be?

MR. HILL: Not with respect to the newspaper article. With respect to the Red Cross materials, there is an indication in the documents, and we cited it in the letter we sent to you in August, that those sorts of materials had been faked in the past. And our client is not in a position to verify that this is, in fact, what it purports to be when it comes purportedly from a third party. So we object --

THE COURT: But you're not in a position to either deny or admit it?

MR. HILL: Yes, Your Honor.

THE COURT: It's not as if you genuinely have evidence that disputes that. That's what I'm trying to understand. You don't have any evidence that would dispute whether or not it is what they say it is, okay?

MR. HILL: Correct.

THE COURT: All they say it is is it's something that was kept in your file, and you don't disagree with that?

MR. HILL: They're offering it into evidence. They're presumably offering it as what it purports to be. If they're not offering it as what it purports to be, that's --

THE COURT: Then I'm trying to understand when you're saying it's not what it purports to be.

MR. HILL: Yes, Your Honor. They are indications in the record that these sorts of things have been faked in the past.

THE COURT: Okay. So because these sorts of what kind of things?

MR. HILL: These Red Cross certifications of incarceration.

THE COURT: And you believe that it doesn't accurately -- is it your position it doesn't accurately reflect the incarceration of the individuals that it indicates?

MR. HILL: In one instance, we have that evidence. In other instances, we don't know.

THE COURT: Well, you do know, you would know whether these people were incarcerated or not and when they were incarcerated, that's in other files.

MR. HILL: Well, I don't know, Your Honor. I don't know whether someone within the client knows or not. They're not incarcerated by us.

THE COURT: Well, there's evidence in the record indicating when they were incarcerated, written reports written by the GIS about whether they were incarcerated.

MR. HILL: And that's hearsay, Your Honor. That's based on a third-party's statements or --

THE COURT: No, it's an admission. The GIS is part of the PA.

MR. HILL: Not when it writes down what other people tell them. That's not an admission, that's hearsay.

THE COURT: So you're not denying that it's accurate -- the information that they recorded in their reports about who was incarcerated, you're not denying that information is accurate, you're just saying that -- your argument is they must have gotten that from a third-party hearsay, that's your hearsay argument?

MR. HILL: That's a hearsay argument.

THE COURT: That's not a foundation argument?

MR. HILL: Right. There is a foundational authenticity objection. The third party --

THE COURT: What is the foundational -- I don't understand your -- and I'm getting to understand it, because it's not any more significant than what the superficial argument you're making. I'm starting to understand, but what is your argument that if the GIS wrote a report, and the report says that this person was incarcerated for this period of time, and it's a GIS report, what is your argument that the foundation is not laid that it's a GIS report if you produced the document, and you have no reason and no logical reason to argue to the jury that somebody snuck into the GIS, and faked this document and put it in the GIS?

MR. HILL: That's not what I'm arguing. I'm arguing with respect to documents that are third-party documents that there's a failure to demonstrate --

THE COURT: Okay. But that's why I want to separate your arguments, because your arguments were not clear in that regard.

MR. HILL: It's not that complicated of an argument.

THE COURT: Then you're not objecting on foundation grounds to exhibits that you produced that appeared to be prepared by your clients, or an agency, or agents of your clients? You're not objecting on foundation grounds that it's not what it purports to be even though you produced it as that?

MR. HILL: Correct.

THE COURT: Okay. So --

MR. HILL: And there's a different issue, but that's the authenticity issue.

THE COURT: You have a hearsay issue?

MR. HILL: Yes, Your Honor.

THE COURT: But you don't have a foundation authenticity issue?

MR. HILL: As to documents that appear on their face to have been prepared by either of my clients, I'm not claiming those are fakes. Sometimes they're incorrect, but they're not --

THE COURT: Whether they're incorrect or not is a different question.

MR. HILL: My clients have not faked any documents. We've got documents from third parties that may or may not be fake, so --

THE COURT: The issue is not whether they faked the documents, the issue is whether there's a genuine dispute as to whether the documents are what they purport to be, and the documents purport to be employment records of the PA, they purport to be ministry of detainee files of the PA, they purport to be martyr files of the PA.

MR. HILL: Actually, the Martyrs Institute is the PLO.

THE COURT: The PLO, I'm sorry.

The GIS files of the PA and the military finance account statements of the PLO.

MR. HILL: I'm not sure what the last category is. That would be the PA, I believe.

MR. YALOWITZ: I think it's Ministry of Finance, PA Ministry of Finance.

THE COURT: Ministry of Finance, not military.

MR. HILL: The Ministry of Finance is part of the PA.

THE COURT: To the extent that you produced those documents, you're not arguing that they can't offer those documents simply because they can't prove that they're what they purport to be? That's not your argument?

MR. HILL: With the exception of the two documents, the misassembled documents, more than one thing put together, and documents we got from third parties, we're not in a position to authenticate those documents because we didn't create them.

THE COURT: So to the extent that you have misassembled documents, to the extent that they give you a list of saying that they want to present these documents, you identified to them which ones are misassembled?

MR. HILL: We did that.

THE COURT: Then they should have -- unless they have a basis to demonstrate that they're part of one document, they will have to designate those documents as separate exhibits. That would be the rule.

MR. YALOWITZ: Your Honor, I apologize. We just

don't -- I'm sure Mr. Hill believes that he identified them to me, and perhaps he did, but if we could ask the Court to just instruct him to do it again, it would be helpful because nobody sitting at this table remembers it.

THE COURT: Well, if you can get your hands on a document --

MR. HILL: We sent it Friday, but we'll talk.

THE COURT: Just last Friday?

MR. HILL: Yes, Your Honor.

THE COURT: Oh, okay. Then that's not so hard to find. Maybe they haven't gotten it yet, I don't know.

But why don't you direct their attention to that, to the extent that those documents are not part of the same document, that they can identify them separately, the pages or the number of pages that you say are separate documents as separate exhibits, so that part of it is dealt with. If they want to argue somehow it is, and they have some evidence to present, then that's their burden to try to demonstrate it's part of the same document.

And with regard to documents that were produced from other sources, the real question is -- and it's a question of admissibility, a purpose that is being used at trial. If it is simply being used to demonstrate that the PA or the PLO had certain information at the time, then it may be admissible for that purpose, that's not a hearsay purpose. But if it goes to

something other than just knowledge, if they want to offer it as proof that something in the document is true, I agree with you, it would be inadmissible, it's not admissible for that purpose just because they accumulated it in their files. If I'm interested in what kind of cases that you're dealing with, just because I accumulate some newspaper articles to say that you were the lawyer in a certain case doesn't prove that you were the lawyer in that case. I agree with that.

So that's the issue, but what's been awkward for me is that your objections have been so broad, and, quite frankly, I haven't found anything yet that you haven't objected to on a broad basis, so that's the guidance that I need from you. So it is not an authenticity problem except to the extent that they want to offer a document to be something other than what you claim it is.

Now, with regard to the three other documents that they say they got from other sources, the same rule applies, except they've got an independent obligation to prove that it is what it is. And I don't know if they can demonstrate that it is what it is. I don't know in what way -- they have to lay the foundation, and it is not self-authenticating. You can't just simply say because it's in the same format as other documents that were produced.

Now, you have to tell me genuinely -- it begs the question why -- two questions: One, why it wasn't produced by

you if it is something that really was generated by you and in your files; and two, if it was -- are you denying that the document is what it purports to be? Again, you can say that that's their burden, but I need to know if there's a genuine dispute about it. If there's not a genuine dispute about it, then the burden is a little lighter, you can't simply hide behind their burden if you know the document is what it purports to be, because otherwise I'll put your people on the stand and let them say under oath whether or not this is a legitimate document or not. They can do that if you genuinely tell me you're not disputing the document, and you're just saying it's their burden.

And there was a third document --

MR. YALOWITZ: So, Your Honor, I'm thinking of two off the top of my head. We're checking to see on the third.

THE COURT: Right. Your argument is that simply because it's got a PA heading is not good enough to say that it's --

MR. YALOWITZ: No, no, no. The one that most comes to mind, I think, is 233, which is this letter that the IDF seized, and we gave it to them in an interrogatory and said, whose signature is this, whose handwriting is this, and they said, well, you know, here are the guys whose handwriting it is. And we say, okay, you've identified the guys whose handwriting it is, you must know if it's authentic or not. I

mean, if we give you an interrogatory that says whose handwriting is this, and you answer it, and you don't say, wait a minute, this whole thing is a forgery, that's a tipoff that it's an authentic document.

So that's why we included that --

THE COURT: That's why I say, I can't just go on burden-shifting here. I've got to know whether or not there's a genuine -- is it your position that the person whose handwriting on the document, that you're denying that that person prepared that document? I don't know what position you're taking with regard to whether it is or isn't an authentic document.

MR. HILL: I'm going to insist on the foundation being laid. I'm not going to reveal attorney-client communications about these issues. Discovery is over. There was a chance to take that discovery, the plaintiffs took what they took, and if they don't have the record now --

THE COURT: That's not a very compelling argument. You can understand that.

MR. HILL: It's the objection I'm making, Your Honor.

THE COURT: I know.

MR. HILL: It's a document they found somewhere --

THE COURT: I'm trying to be fair to you, fair to both sides. You know what, technically, I can just let them throw one of your guys on the stand and force them to admit whether

or not this is an authentic document.

MR. HILL: Discovery is closed --

THE COURT: It's not discovery. They have a document. You have the document. The question is, who's going to lay the foundation for the document. If you know that your person has to acknowledge that this is a true document, you can't say to me that they can't lay the foundation, because otherwise I will let them give you an interrogatory today, and either you deny or admit that that's a legitimate document.

MR. HILL: Well, I would urge Your Honor not to reopen discovery --

THE COURT: I understand that, but, look, I'm trying to be fair to you about this. I'm trying to figure out what genuinely is in dispute and what's not in dispute. You can't play a shell game with this. If this is in dispute, tell me, and I will protect you from any undue prejudice, but if this is just, I want to outsmart the other guy, I'm not particularly persuaded by that. If you know that this is a genuine document, but you're objecting even though you know that you have no legitimate basis to contend that this isn't what it purports to be, that's just -- I'm not compelled by that. You can understand that, can't you?

MR. HILL: I hear Your Honor. My position is, as I've stated it, the plaintiffs can't lay the foundation, and Your Honor should require them.

THE COURT: Well, you have to make up your mind. Either I'm going to -- with regard to those documents, that you're going to take that position, I'm either going to allow them to put the document in as it -- unless you have a legitimate argument to make that it's not what it purports to be, or if you don't want them to do that, I'm going to allow them to give you a request to admit, and you're going to have to either admit or deny, that will go before the jury, whether or not that's a legitimate document. That's your choice.

MR. HILL: Your Honor, I would need to consult with my clients.

THE COURT: All right. Well, you can make your decision, whatever you want, but if it's genuinely unfair to your client, then I will genuinely protect you from it, but if it's just the gamesmanship of it, I'm not going to protect you.

MR. HILL: Your Honor, it's not gamesmanship, it's discovery. There was 18 months when the plaintiffs produced this document to us when they could have taken whatever discovery they wanted about it. They have twice asked to reopen discovery on this particular document, and Judge Ellis twice found there was not good cause to do so, and you twice overruled their objections to those rulings. And for us to be less than a month for trial, for you to be reopening discovery, I will say --

THE COURT: Yes, but for you to now object to the

document on foundation grounds, even though you know it's what it purports to be, is not a legitimate way to proceed.

MR. HILL: Your Honor, we're entitled to put the plaintiffs to their proof, we're entitled to the plaintiffs complying with the rules of evidence, and that's what I'm asking the Court to do, is enforce the rules and put them to their proof.

THE COURT: I'm going to tell you this, I'm going to allow them -- unless you tell me, make an affirmative statement that you are contending that it is not what it purports to be, I am going to allow them to admit. I'm not going to be used that way. Unless you're going to make the representation it's not what it purports to be, I am not going to hold that the document is inadmissible on foundation grounds. I think it is sufficient that it appears to be the same kind of document that you produced, and you are unwilling to say that it's not -- not an authentic document. That alone compels me to allow them to do that, unless you tell me there's a genuine dispute about the authenticity of the document.

That's going to be my position. So you have to decide what you want to do with regard to that.

Now, with regard to the third document, I remember now the third document was a document that they contend was produced in another litigation by --

MR. HILL: I'm not lodging an authenticity objection

to that document.

THE COURT: Okay, but that's one of the three.

MR. HILL: You're testing my memory, but I think Your Honor is correct.

THE COURT: So you are lodging -- you're withdrawing that objection?

MR. HILL: I don't think I made it. To the extent my law firm produced the document, I don't think I've --

THE COURT: No, but you didn't produce it in this litigation. I thought there were two documents that they found independent -- no, three documents they found independently, and one of those three documents, you had produced not in this litigation, but in a third.

MR. HILL: I know, but the one I produced in another case, I don't dispute the authenticity.

THE COURT: So there are really only two documents at issue that you have that weren't produced by them, all right.

Now, if you want to genuinely tell me that you dispute that there's a reason that a trier of fact should conclude that this is not what it purports to be, then I want to hear it, but if you know it is what it purports to be, no, I'm not going to allow you to simply say, even though we've known they had this document all along, we know they intended to offer this document all along, there's a possibility they might offer this document, we didn't produce it to them, but we know that that's

really a legitimate document. If that's the case, I'm not going to grant your application that they should be precluded on foundation grounds. That's my position. I think that's a fair position.

So if you genuinely think that you will be prejudiced by their offering something that you know or believe it is not what it purports to be, then tell me and make an affirmative representation that that is what you're complaining about. If that's not what you're complaining about, I understand the nature of your objection, and I find that that is not a sufficient basis to object on foundation grounds. And if it was, I would at least -- and I think it's more unfair for me to allow them to give you a subpoena and make you put somebody on the stand to authenticate the document against your will, so I will suggest that I'm going to at least not try to do that to you, but I think it wouldn't be reopening discovery. They have a right to subpoena a witness to say whether or not this is authentic or not, genuinely if that's what the witness is going to say. Whether that witness is employed by you or not employed by you, or show them that document in front of one of your witness's faces and say this is a real document, isn't it, and making them admit it, okay?

And if you want to object to it on some other basis, that's fine, but it seems to me they have a basis to do that, and if you want me to force them to do that to one of your

witnesses, I'll consider that, but if you genuinely know and don't want to say that you know that this is a legitimate document, and you're just trying to outmaneuver them on this issue by saying, well, you can't prove it, I'm not sympathetic to that argument.

So let me do this: I see no basis to exclude any of these exhibits on foundation grounds. I don't. Now, if you guys want to go through the time-consuming process of going through each document and laying the proper foundation, I will consider that, but I think the proper foundation is, particularly with most of these documents, that these documents -- that we made requests of the defense, and they produced these documents, and these documents were produced by the defendants. And I think that, in itself, is a legitimate basis for a jury to conclude that the documents are what they purport to be. Otherwise it wouldn't make a whole lot of sense for you to produce them if you thought they were fakes and forgeries, and you -- and they were asking for employment records.

Now, to the extent that you want to fight about that in front of the jury, let's put it this way, I assume our jury is going to be a very reasonable jury, and they will see through that, but if there's a genuine dispute about it, then I'd suggest you concentrate on that and identify that for me so that I can protect you from undue prejudice that might be

inappropriate because the jury may think a document is something that it really is not. So with regard to that, that's what I rule.

With regard to the -- give me five more minutes, and then we will decide whether we're going to come back this afternoon and continue.

I've identified -- I guess the plaintiffs put together a chart that laid out the separate charts with regard to the information that has been requested with regard to the documents. Let me remember what I did.

Now, the first thing I did is, to the extent that the defendants have identified portions that they want redacted -- and that's a question of the redactions the Court issued with regard to hearsay and any other objections to the substance of the document -- to the extent that you've made certain objections, and that's not the portion that the plaintiffs said was the relevant portion that they wanted to admit, I'm going to give you a default position, I'm going to tell them to redact it in that regard.

Now, there may be some portions that both sides may want to identify because you can do it simultaneously that somehow that doesn't work with regard to certain documents, but I ask you both to -- I ask the plaintiffs to identify to me what is the relevant portion of the document they want to admit, and I ask the defense to identify for me what portion of

that document they objected to. To the extent that they don't overlap, the plaintiff can offer that portion of the document that says what they want it to say, the defendant can redact and have the plaintiffs redact that portion of the document that they objected to that wasn't the portion that the plaintiffs said they want to admit. Okay, that's my default position.

Now, with regard to several other exhibits, I went through all of the exhibits, and with regard to where there is overlap -- let me see if I can -- I have it in a proposed order. Let me look at it over lunch, but let me quickly go through. I have Exhibit 17. All the objected-to statements with regard to Exhibit 17 should be redacted, other than the sentence that begins with, "She is considered" and ends with "shekels a month."

MR. YALOWITZ: Your Honor, can you bear with me just a minute. This is the Wafa Idris martyr file, right?

THE COURT: Yes.

MR. YALOWITZ: I'm just trying to find it in my chart, which is a little challenging.

THE COURT: I just don't have a clear recollection. Page 83.

MR. YALOWITZ: Okay, great. Thank you.

So I'm sorry, Your Honor, I just was looking for the document when you were speaking. I apologize.

THE COURT: All right.

Yes, the portion at the top of 84.

MR. YALOWITZ: So you want us to redact, "The martyr is one of the Al-Aqsa Intafada martyrs"?

MR. HILL: Objection.

THE COURT: I want you to redact everything that they objected to other than that portion at the top of 84.

MR. YALOWITZ: I apologize, Your Honor, I'm just not following the ruling.

MR. HORTON: The sentence "She is considered" remains in?

THE COURT: That remains in.

MR. YALOWITZ: "She is considered" remains in?

THE COURT: Yes.

MR. YALOWITZ: How about the portions on 83?

THE COURT: Out.

MR. YALOWITZ: May I be heard on that, Your Honor?

THE COURT: Well, why do you say that that's admissible? And I don't need to go into details of what it says here, just tell me what's the purpose.

MR. YALOWITZ: Okay. There are a number of purposes. First of all, these are admissions as to the actual facts of what happened when she blew herself up, number one.

THE COURT: Well --

MR. YALOWITZ: And I don't think it's in genuine

dispute that she blew herself up.

THE COURT: No, no, no, no. I know why, because the statements that you want to attribute to them are statements that in their -- and I checked it -- they accurately quote. It says, "Accorded to the enemy media." That's what it says. It doesn't say they're admitting this. They say this is what the enemy media says. No, that's not admissible for the purpose that you are trying to admit.

MR. YALOWITZ: Here's why I think it is. First of all --

THE COURT: That's not their admission that those facts are true.

MR. YALOWITZ: All right. Well, their job --

THE COURT: I understood that.

MR. YALOWITZ: Their job is to gather information and decide whether or not to pay the family.

THE COURT: Okay.

MR. YALOWITZ: So they gather up a bunch of information, and then they evaluate it, and they decide, is it true or is it not true.

THE COURT: Right.

MR. YALOWITZ: And if it's true that she blew herself up among a crowd of Zionists or whatever it says there, then they pay her.

THE COURT: No, but that's not their words, that's the

whole point. They're not calling --

MR. YALOWITZ: They're adopting it. Those are their words, and I think the jury is entitled to see those words.

THE COURT: No, the jury -- what you just said that you wanted as facts is what I gave you that I said stays in at the top of 84. Those are the facts on which they determine to decide to make those martyr payments.

MR. YALOWITZ: Maybe I'm not following you, Your Honor.

THE COURT: The top box on 84.

MR. YALOWITZ: "Department's Recommendation"?

THE COURT: That top box. I'm giving you the top box on 84.

MR. YALOWITZ: But what I really want is the --

THE COURT: I know what you want. You want the statement that says, "According to the enemy media," and you want the statement that says, you know, she was against the Zionist occupied Israel. I find two things: One, that the first part of that statement are not statements by them, it's statements quoting someone else and quoting obviously someone who's not speaking for their interests; two, the second part, I just think the potential prejudice outweighs any probative value, particularly in light of the fact that the only relevance of this document would be that they had information that you've laid out at the top of 84, and based on that

information, they decide to make these martyr payments. That's --

MR. YALOWITZ: It also goes --

THE COURT: There's no factual allegation about what she did that is somehow in this other part of the statement the way you want it. That's not the relevant information here. That's why I'm giving you that portion.

MR. YALOWITZ: May I just give you two other things on 83? The first is, the language that they use, "Crowd of Zionists" --

THE COURT: I find it's more prejudicial than probative. That does not make them responsible for any terrorist act. Anyone can make that statement. Anyone who has a point of view that is an opposite of the point of view that Israel has could have made that statement. It's not probative of any knowledge of a particular terrorist act, it's not probative of the fact that they participated in this probative act, and, in fact, if the jury were to use it for that purpose, it would be unduly prejudicial to use it for that purpose.

You cannot say that using the term Zionist means that it is more likely than not that they committed any one of the incidents or violent acts that are at issue in this case. And to do so is improper, and that's exactly the reason why I thought you wanted it, and that's exactly the reason why I'm keeping it out.

MR. YALOWITZ: Let me just say this -- and I don't want to -- I understand what Your Honor said, but this is a case in which state of mind is an element of my --

THE COURT: No, knowledge is an element. State of mind is not an element.

MR. YALOWITZ: Knowledge or intent.

THE COURT: Intent to commit the terrorist act.

MR. YALOWITZ: Right.

THE COURT: Not intent to have animosity against Israel or the Israeli people.

MR. YALOWITZ: Well, okay, but when they say --

THE COURT: That's a given that these folks disagree, and they have strong feelings against each other. This does not make it more likely than not that they committed the act that you want -- that you've accused them of. It has no probative value to that issue.

MR. YALOWITZ: Okay. I agree on the actus element, but we understand people's state of mind by looking at their words before --

THE COURT: Right, the relevant state of mind.

MR. YALOWITZ: Right. Before and after the --

THE COURT: What state of mind do you say the word "Zionist" represents?

MR. YALOWITZ: It's a heroic martyrdom operation.

THE COURT: What state of mind do you say that that

represents?

MR. YALOWITZ: Knowledge and intent.

THE COURT: Of what?

MR. YALOWITZ: Of terrorism. Knowledge and intent of committing acts of violence for a political purpose, for an apparent political purpose of influencing the government or coercing a civilian population.

THE COURT: But that's not what's at issue here. What's at issue is whether they participated in these acts.

MR. YALOWITZ: It's my burden to show on international terrorism, number one, that it's a crime of violence, that's pretty easy; number two, that it had the apparent intent of coercing a civilian population, or influencing a government by coercion, or affecting the conduct of a government --

THE COURT: That's fine, and I don't disagree to some extent that that's true. But that's another reason why this is not admissible, because it's just cumulative. You have plenty of evidence about people being martyred, and you even have evidence in this file about this person being martyred. The other evidence that you want in the context that you want it, that they're quoting statements that they attribute to the enemy media, and that they're referencing Zionists, no, that's not more probative than the other evidence that you have that you're offering in the martyr files with regard to other individuals and specifically with regard to whether or not this

person received martyr payments and went into their decision to decide to give this person martyr payments. I understand that argument, and that's in, but it is not the proper way to put it in by simply wanting the prejudicial effect of quoting from the, quote, enemy media and calling people Zionists. That's my position.

MR. YALOWITZ: I accept that.

There are two statements that I want to -- that I really feel strongly about. The first one is, "The operation was claimed by the Al-Aqsa Martyrs Brigades (the military wing of Fatah)." Fatah is Arafat's dominant faction of the PLO, and there's a dispute in this case whether the Al-Aqsa Martyr Brigades is the military wing of Fatah. That's a disputed issue. And here we have a document in which the defendants themselves, in a report -- this is not quoting enemy media, this is their statement, their admission -- that Al-Aqsa Martyr Brigades is the military wing of Fatah.

THE COURT: Well, unless you have some more information about the context of this statement, I don't know why I can conclude that. This is in quotations. Who do you say that they're quoting?

MR. YALOWITZ: No, it's in quotations from the defendants. The defendants are quoting. It's not in quotations in the original document.

THE COURT: Oh, okay.

MR. YALOWITZ: No, this is an admission in an official document by the defendant --

THE COURT: But I thought you had other evidence that you intended to offer that was --

MR. YALOWITZ: That's not my only piece of evidence, obviously.

THE COURT: Wasn't this cumulative of other evidence, more direct evidence that you say that you have that demonstrates this?

MR. YALOWITZ: Look, I think -- we have a lot of evidence. I'm not going to lie to you that we don't have a lot of evidence that Al-Aqsa Martyr Brigades is the military wing of Fatah, but this is a direct admission in a key document in the case. I just ask you to reserve decision on that.

THE COURT: I'll think about it, but I'm not going to reserve decision. This is my ruling unless I'm convinced otherwise to change it.

MR. YALOWITZ: Fine. As long as I have the opportunity to come back to you.

The second one is, it says -- and this is their conclusion -- and, again, it goes to their ratification and state of mind -- they say, "She was martyred during a heroic martyrdom operation against the Zionists" -- you want to take out the word Zionists, I don't care -- "in the occupied City of Jerusalem." That's their conclusion in their report.

THE COURT: So you want to offer evidence, because they described it as heroic, that means they must have been complacent in nit?

MR. YALOWITZ: That they approved it, they --

THE COURT: How does that say they approved it? It may mean that they approved of it, but it doesn't mean they preapproved it.

MR. YALOWITZ: I think a reasonable jury could conclude that based on this statement, they ratified the acts of this --

THE COURT: You can't prove your case that way. That doesn't prove your case. Even if they said, after every incident, we're glad it took place, that doesn't prove your case. You can't sue them for millions of dollars for taking that position. That may be an objectionable position from your point of view, but it doesn't prove liability on their part, because they decided that they agreed with it.

MR. YALOWITZ: I think that I need to show a link between her and the defendants in advance.

THE COURT: Right. This doesn't do that.

MR. YALOWITZ: I agree. I can show that through other evidence.

THE COURT: Right.

MR. YALOWITZ: And then it's just like the analogy of the law clerk, if your law clerk comes in and says, I just

murdered someone --

THE COURT: And I said, you know, that's good, I never liked that person, what does that mean, you would sue me for murdering the person? No, that doesn't follow.

MR. YALOWITZ: If your court officer comes in and says, I just murdered somebody in front of the courthouse --

THE COURT: And I still say I'm glad you did, I never liked that person anyway, you still couldn't sue me.

MR. YALOWITZ: I think -- well, you're an employee --

THE COURT: It doesn't matter, take that out of the equation. Under no scenario can you advance liability by saying they were glad that it happened. That's not the way you conclude this case.

MR. YALOWITZ: Right, happiness -- the emotion of happiness doesn't prove liability.

THE COURT: If you want to demonstrate that after she did that, they martyred her and made payments to her, and you want to argue that that's further evidence that they could infer from that that they asked her to do it, or helped her to do it, or told her if she was going to do it, they would pay her or gave her some expectation if she did, that's for you to argue, but not on the inflammatory words that these are Zionists, or she's heroic, or -- that's not the way --

MR. YALOWITZ: Your Honor, I think if you go glorifying somebody who's a murderer, even a suicide murderer,

that indicates --

THE COURT: Indicates what?

MR. YALOWITZ: -- your state of mind about --

THE COURT: After the murder?

MR. YALOWITZ: After the murder.

THE COURT: How does that indicate -- your state of mind after the murder doesn't make you liable.

MR. YALOWITZ: We understand people's state of mind based on what they say and what they do before and after the events.

THE COURT: I know, but you can't just say state of mind. And as you look at these things, you should focus on what you have to prove and argue it to me. It's got to be knowledge or present or prior intent, okay? It can't be afterthought or what I felt about it after it happened. It's got to be that it's reflective that I had knowledge that it was taking place or that I intended, before it took place, that it was to take place.

If you don't prove those, you don't have any relevant knowledge.

MR. YALOWITZ: Are you going to give me a charge like the one that Judge Kogan gave in the Chowdhury case about ratification? This is -- I understand --

THE COURT: I haven't resolved that yet.

MR. YALOWITZ: I understand the debate --

THE COURT: I don't know what your theory is with regard to ratification. It's not -- I just can't decide this. I don't know what the proof is going to be. I don't know what theory you're going to say that this case is simply proved by the fact that they committed the act; after they committed the act, they said good job, you know, here's some money.

MR. YALOWITZ: Well, let me give you an example of what I'm thinking about.

THE COURT: Well, let's do this. Let's take our break. I need to give my court reporter a break. Let's come back this afternoon, we'll continue this, and if you want to be more specific. With regard to a lot of these other things, I can tell you right now that a lot of the other documents contain the indictments and the verdicts.

MR. YALOWITZ: I don't care about that.

THE COURT: Well, I'm just saying that my ruling, consistent with the indictments and verdicts, is that they're going to come in -- that they're coming in with regard to the other exhibits, they're coming in in this form, and they're coming in redacted the way we say they're going to be redacted.

MR. YALOWITZ: That's fine.

THE COURT: If I say they're inadmissible, they're inadmissible, so that's it. That's an easier one to address, unless you have an independent argument to make about that.

MR. YALOWITZ: No, that's fine.

THE COURT: And the same thing about the sentencing opinions that are out. But I have some other -- quite frankly, I have about -- there are about a dozen exhibits that I think either are inadmissible or need to be redacted, and I will go through those this afternoon. But to the extent otherwise there are arguments about hearsay, and I'm not sure I know of any other -- we went past the foundation, but I don't know of any other ground that they've articulated at this point other than hearsay and being offered for the truth of what's in the document. On hearsay grounds, whether -- what reports were written by GIS, whether there are martyr files to represent the payments that were made or not made, whether or not the employment records indicate whether they were employed or not employed, I don't think that those are hearsay -- legitimate hearsay objections to that, nor do I hear any legitimate objection challenging even the truth of what the documents represent.

MR. YALOWITZ: Where are you, Your Honor, on -- so such-and-such an employee is serving 15 life sentences for murder, he's currently in such-and-such a prison, he's good in terms of security and morals?

THE COURT: I don't have a strong reaction one way or the other about that, because I'm not sure what you're going to contend that that means.

MR. YALOWITZ: That goes to scope of employment.

THE COURT: It goes to employment, but just because they say he's a nice guy, I don't know what that -- I'm not sure -- depending on what you guys are going to try to argue that it means, I'm not even sure the nature of the objection, but I'm not even sure the purpose on which -- I assume you're trying to imply that because they say he's a nice guy, they're really referring to the fact that he's a nice guy because he kills people. If that's what you want to argue, I don't know if that makes the document admissible or inadmissible, but it seems to me that that's for the parties to argue about, whether or not that reflects some intent on their part to -- or that coupled with some evidence that they participated in the act.

Your problem with proof is not one of intent. Your problem with proof is trying to tie it in directly to how they participated in the act and what evidence that you have. That's what's going to determine this case, if you have some evidence that they either assisted, planned, or helped coordinate one of these acts, and that evidence is admissible. That's going to take you a long way. But if your evidence is just that they're on their side, that's not going to go very far, you know that.

MR. YALOWITZ: No, no, it's more than that. If you're running the NYPD, and you have a cop who's serving 15 life sentences, and you keep him on the payroll, and you say he's good in terms of security and morals, that suggests that what

he's doing is okay by you within the scope of his employment.

THE COURT: Well, as I say, that's an argument -- I think if you have admissible evidence, and I think it sounds like some of this will be admissible for you to make that, I think that's an argument that the jury can consider, but I think there's just a legitimate or strong argument on the other side to argue that it doesn't necessarily mean that. That's for the parties to argue, that's not an issue of admissibility.

MR. YALOWITZ: Agreed.

THE COURT: The question is if we know -- the importance of these files, as far as I'm concerned, is that we know that if they were in their files, that they at least had some awareness -- I'm going to use the word knowledge -- they had some awareness of the information that was in the files. Now, what that awareness means is an issue for the jury to resolve and for the parties to argue. It may mean that they knew about it beforehand, they participated in it, or it may mean that they didn't know about it beforehand and just approved of it. It may mean that they didn't approve it because they decided they were going to arrest people. That's for the jury to determine. As far as I'm concerned, that's not an admissibility issue.

And unless -- as I say, I've gone through these documents. The employment records -- quite frankly, the employment records are not much in dispute. Whether these

people were employed is not much in dispute, and it's not the argument that you guys are going to be arguing. If you're going to say they were employed, they are going to have to say, yeah, they were employed, but it doesn't mean they were employed to do terrorist acts or it doesn't mean we had any idea that they were personally involved in these terrorist acts. That's the argument to be made for the jury, it's not an argument about admissibility of the employment records. I think the employment records were totally legitimate employment records, and there's no genuine argument to be made that they reflect some untrue state of affairs, okay, or that they're somehow inaccurate, or they're somehow giving false impression to the jury of the relationship between the PA, the PLO, and these individuals. The strongest evidence of what the relationship is is their employment records, if they were employed.

Now, what they were employed to do, and what they were aware that they were doing, and whether or not you can even establish to get to the jury that this was in the scope of their employment is a different issue. That's a different issue. But I think most of these issues that I'm addressing, it more has to do with the form of the information rather than the information itself. If you want to argue that, obviously we're happy when these terrorist acts took place, and there's some evidence of that, sure, there's some probative value to

that. I guess they will argue on the other side that, look, we arrested some of these people, and we're trying to do the lawful thing in terms of preventing people from doing that. It's legitimate to offer that. It doesn't mean that they were or were not, as you argue. It doesn't mean they were or were not, it means the question is are their statements and actions genuine, or are their statements and actions such that they're simply trying to cover up their participation because there's other evidence that indicates they participated in these crimes.

So I will continue -- let's do this --

MR. YALOWITZ: I think your court reporter probably needs a break.

THE COURT: Yes, we're going to take a lunch break. We're going to come back at -- let's say 3 o'clock, and then we'll go probably another hour, and I'll tell you what else I need to resolve, but I'll reorganize myself.

MR. YALOWITZ: Thank you, Your Honor. See you at 3:00.

THE COURT: You're welcome.

(Luncheon recess)

AFTERNOON SESSION

3:00 PM

THE COURT: I've spoken to jury. I think we can adjust and give you a little more time for the jury.

MS. FERGUSON: Thank you, Your Honor.

THE COURT: We'll still have them fill it out, the questionnaire, on the 7th. What I'll need is, you should make copies and get me back the original the morning of the 8th, just the original. And you can have until the close of business on the 9th to get me your forms.

MS. FERGUSON: Thank you, Your Honor.

THE COURT: So that will give you two days with the form.

What I will do is, I will go through the forms and be able to tell the -- we'll meet on the 12th, I'll tell you and the jury room, who we'll bring back, and we'll bring them back on the 13th, and we can address any other issues that are still outstanding that we haven't really resolved on the 12th before we start on the 13th. So we will start the trial on the 13th.

MR. YALOWITZ: Your Honor, what time on the 9th would you like those forms?

THE COURT: Since I'm the one that's going to be working over the weekend, not you, I would like them -- if you can get it to us -- well, the reality is, if you can even just electronically send it to us, I would appreciate having it by

5 o'clock, but --

MR. YALOWITZ: That will be great. That way, I can take the weekend off.

THE COURT: You guys can take the weekend off and prepare more substantively for trial.

I'll have the questionnaires themselves the next morning, so I'm going to go through the questionnaires myself, so I'll have a feel -- clearly people who checked off saying, I can't do this, I'll know who they are and something about the kinds of answers that we get. And then all I need is your form, and you can do it electronically, send that to me, and then I'll have both forms, and we can go through them, my law clerk and I, and hopefully come up with a section of jurors to voir dire.

MR. YALOWITZ: Did Your Honor contemplate they would be blind to the other side?

THE COURT: Yes.

MR. YALOWITZ: It's a strategic issue with preemptory.

THE COURT: I'm not trying to put anybody at an unfair advantage or disadvantage, but the reality is, all I'm interested in is if you invoke -- identify some people that you both find are acceptable. I don't know whether or not -- how sincerely you are going to be in terms of clearly identifying a large number or a small number of acceptable people, but I'm thinking if you both identify a hundred of the same people that

are acceptable, it makes my job easier. If you only check off three people who are acceptable for voir dire, then, as I say, I'm going to go to my fallback position to just go back and forth with regard to who checked off somebody acceptable and who the other person didn't, and then if I've exhausted that, then I'm just going to go to people who neither one of you checked off for any reason at all and put them in.

MR. YALOWITZ: And ultimately, just because there's an objection for cause doesn't mean it's a good objection.

THE COURT: No, but, look, I'm not going to -- I'm going to look at the form. It doesn't matter what the objections are as long as I have enough people who you both want to voir dire, and they're going to fill the box. So why waste my time arguing about whether or not there's objectionable cause if I have 30 people you both say are acceptable.

MR. YALOWITZ: I agree with that.

THE COURT: My hope is that you are able to do that, but as I say, this is either a process or a strategy, so you can either be -- you can approach it the way you will. I hope you generally approach it that you reasonably look at the questionnaires, as we all are going to look at them, and we should be all pretty much in agreement that certain people clearly are not people that you would want in this case, one side, or the other, or both sides, or any of us, and other

people, there's nothing that looks wrong on the form.

You see that I took out a lot of the direct questions about people's religions and that sort of thing. I think there are enough nuanced questions in terms of whether they visited the area, they have had relatives who have been there, whether or not -- I put in the context of -- because we have translations, whether or not they understand Hebrew or understand Arabic, so you'll at least have some of that kind of information.

I had some more general questions about -- I combined some of your questions about whether they had any religious, political, or other views that would make it difficult for them to be a fair and impartial juror. I don't think it's appropriate to strike somebody just because they're Jewish or Israeli, and I don't think it's appropriate to strike somebody just because they're of Arab descent or Palestinian. Look, it depends on what the answers are, and I'm not going to consider challenge for cause just because you say, I don't want this guy, he visited Israel.

MR. YALOWITZ: Look, I haven't gone through the questions, but that basically was my approach.

THE COURT: That was my thrust, and then I went through the objections that you had, each side, and I understood most of the nature of the objections, and I either took those questions out or I refashioned them in a way that I

usually ask them, in a more innocuous way, so that jurors understand, look, we're just trying to understand who they are and what their backgrounds are.

Quite frankly, you have much more information than I would usually get from jurors in voir dire. I couldn't care less what TV shows they watch or what newspapers they read. I don't ask those kinds of questions. It makes absolutely no difference to me. In most cases, it makes absolutely no difference, but if you want to know if they watch reruns of the Muppets, let them tell you that.

MR. YALOWITZ: That might be material, Your Honor.

THE COURT: As I say, I don't think it usually affects the verdicts that we get in these cases, so I don't usually spend a lot of time asking those questions.

So I'll accommodate you that way, I'll give you more time with it, but that means that I need it back right away. If it's a simple process for us to just simply grab 50 people that we see that both say they're acceptable, then that would be the easy process, and then I'll let you know first thing. So you'll know about the same time, if not before, the jury room starts to call jurors on Monday, but the problem is, they literally need to call every juror and tell them whether they have to come here or not. Even the first day, I'm trying to coordinate with -- we still have to talk further about how I'm going to handle jurors during the trial. I don't know who's

going to show up at this trial, I don't know if a lot of people are going to have an interest, I don't know if a few people are going to have an interest, I don't know if people are going to protest, I don't know what they're going to do, so I want to be able to get the jurors into the building without any interruptions or being accosted by people who have a point of view that they want to express.

And I don't want them mingling in the hall and running into people who might try to have a conversation and want to express their point of view to their friend who happens to be here, and they happen to be talking while the juror is here. I have had enough experience, as I probably indicated, in the last year where a juror had gotten into the wrong cab, and the defendant happened to jump in front of her and jump into the cab, and she gave him the finger, so now the lawyer wants to excuse the juror because she's biased against her client, and it turns out to be a complicated issue in a very high profile case. So the confrontation that might seem insignificant could end up being significant if one of your clients or representatives happen to say something in an elevator, and there happens to be a juror in the elevator, or I give the jurors a break, and somebody walks out of the courtroom, and the jury is in the hall and says something about the case, or about one of the witnesses, or one of the parties. I'm going to think of some ways that I have used in the past and some new

ways to try to insulate the jury from that kind of contact.

Let me just go back to quickly -- and then I had some questions with regard to some of the motions in limine, even though I didn't indicate I would resolve them all today, but I can give you some guidance. I'm going to go back to the 177 exhibits.

I'm fashioning an order, I'll give you an order, but basically other than 17 that we have talked about, I think there's at least 65, 66, 67, 69, and 70 that have either -- do we have the -- they're either indictments or a sentencing verdict.

Obviously, with regard to those, I'm applying the same rule that I am applying with regard to the admissible ones. However, it was awkward for me to try to figure out exactly what was there and what wasn't there. It either was because it was difficult for me to figure it out or it's genuinely that information wasn't there. It seems to me that you're raising issues now that I approached it, and I think I approached it inaccurately. I approached it as if all of the defendants on the list that I had in criminal cases were individuals who were found guilty or pled guilty to offenses that are at issue in this case, and that that's what was reflected in the 177 exhibits. Now I'm understanding that the defense's position is that some of the people who pled guilty also pled guilty at the same time to things that are not related to this case --

MS. FERGUSON: Right.

THE COURT: -- and that there may be indictments and pleas or convictions of individuals on that list or in the 177 exhibits that are convictions that have nothing to do with this case.

MS. FERGUSON: That's right, Your Honor.

MR. YALOWITZ: I don't agree with that. At least I can't think of an example offhand, and I don't know why I would want to put in evidence of somebody who was convicted of something having nothing to do with the case. We've got enough evidence just to deal with seven attacks.

THE COURT: That's why I say -- I just raised that, so you're going to have to identify for me, one side or the other, if that's the case because I didn't notice that, and then as I started discussing it today, it seems like that's what at least one side is under that impression. But obviously, to the extent -- I'm assuming that the convictions -- whether they be by plea or verdict, that the convictions that you're offering are convictions of individuals who were convicted of participating in one of the acts at issue here.

MR. YALOWITZ: Right, except for the material support convictions. So Shubaki, who provided weapons to Al-Aqsa Martyr Brigades or Abdullah Barghouti who provided --

THE COURT: But that's -- is that on the list of --

MR. YALOWITZ: That's in the military court

convictions. I don't think it's in the 177. I don't think those two guys are in the 177.

THE COURT: All right. Well, I'm going to assume -- and those are convictions of what? You're trying --

MR. YALOWITZ: Okay. So like Fuad Shubaki, a top Arafat advisor, he's convicted of gathering and supplying -- gathering, controlling, and supplying all weapons to the Al-Aqsa Martyr Brigades. Al-Aqsa Martyr Brigades perpetrated, I don't know, four of the seven attacks or something like that.

THE COURT: So you want to establish that --

MR. YALOWITZ: Material support.

THE COURT: -- a person who is either employed or an agent of the defendants was directly providing support to a designated terrorist organization?

MR. YALOWITZ: Correct.

THE COURT: Okay.

MR. HILL: The problem is that the conduct for which he was convicted was before Al-Aqsa Martyr Brigades was designated. Al-Aqsa Martyr Brigades was designated, as Your Honor noted in the summary judgment order, on March 27th, 2002. Mr. Shubaki was arrested by the PA in January of 2002, so all the conduct of which he was convicted necessarily predates the designation.

THE COURT: You don't contend that that would establish a violation of the ATA if he committed those acts

prior to the designation?

MR. YALOWITZ: Those are -- I think it's evidence of the pattern of his conduct.

THE COURT: But as I say -- let me address those issues separately. You're not contending that you can literally meet the elements of the claim by showing that he supplied -- he provided material support prior to the designation?

MR. YALOWITZ: Correct.

THE COURT: So that's not what you are directly trying to prove by that evidence. You want to offer that evidence to prove what?

MR. YALOWITZ: Pattern.

THE COURT: A pattern of what?

MR. YALOWITZ: A pattern of support for Al-Aqsa Martyr Brigades by the defendants.

THE COURT: Do you have any evidence that had continued after --

MR. YALOWITZ: Yes, after the designation.

THE COURT: After the designation?

MR. YALOWITZ: Yes.

THE COURT: So what is your proof that it occurred after the designation?

MR. YALOWITZ: We have expert testimony, we have convictions of other people, like Marwin Barghouti, Nasser

Aweis. So we have a number of pieces of the puzzle that show support for this terror organization before, during and -- before and after the actual designation.

THE COURT: Well, we can discuss further, as we get closer, and I look more in the context of the other evidence, whether or not it makes sense to exclude or include some of the prior evidence that you want to offer, if there is evidence that --

MR. YALOWITZ: That it continued? Right.

THE COURT: After the designation.

MR. YALOWITZ: Right.

THE COURT: Again, a lot of these issues depend on the nature of the claim and the nature of the defense. If the defense is other than they can't prove their case, it depends what you're arguing to the jury.

MR. YALOWITZ: I agree. 2339(b), an element of the claim is that they are a designated terror organization. So 2339(a) --

THE COURT: Unless you can show they provided material support after they were designated.

MR. YALOWITZ: After they were designated, right. 2339(a) doesn't require designation, but it requires a more direct connection between --

THE COURT: To the act.

MR. YALOWITZ: To the act.

THE COURT: The terrorist act itself.

MR. YALOWITZ: Yes.

THE COURT: But that's not what this evidence goes to.

MR. YALOWITZ: Not Shubaki, right.

THE COURT: I have it. But as I say, my general rule, and I think it applies to most, if not all, the circumstances, is that other than issues about providing material support, to the extent that you're trying to prove either that the respondent superior relationship, employment relationship in furtherance of that employment, and/or that they had a direct involvement in perpetrating a particular act, the convictions of those individuals who acknowledged or were found guilty by a tribunal of committing those acts are admissible and admissible in the form in which I have indicated, their pleas, their hearing minutes, they're indictment that they acknowledge that they were pleading guilty to, and to the extent that there was a trial, a bench trial or a trial verdict, the actual verdict that the court rendered and not the sentences.

So I think that I have identified -- we talked about 17, which I know you want to further argue in the future, but with regard to -- and I have 65, 66, 67, 69, and 70, I had issues with. In 65, I have a sentence at the bottom of page 57, if you're looking at the joint chart, that sentence under that rule should be out.

MR. YALOWITZ: Okay, we understand the ruling.

THE COURT: Okay.

And then --

MR. YALOWITZ: Is Your Honor going to issue an order on this?

THE COURT: I am. I have an order drafted, but I didn't issue it because I wanted to have this discussion first because this is helpful because I'm tightening it up in light of this discussion.

MR. YALOWITZ: Right. But I don't have any concern about Your Honor's ruling on 65.

THE COURT: 66, also the same thing. There's an indictment. Obviously to the extent that this is an indictment that somebody pled guilty to that you are independently admitting, that's fine, but to the extent -- my understanding is this indictment is not an indictment of a person who pled guilty to this indictment and is not otherwise on that other list.

MR. YALOWITZ: I have to check, Your Honor. It may be that he pled guilty to the indictment, it may be that he didn't. If he didn't, we'll take it out. If he did, we'll leave it in.

THE COURT: Right, just apply the same rule.

And 67, I think, is the same thing. 67 is an indictment on page 69, and I could not find this indictment on that other list to be an indictment that is pled guilty to by

one of the defendants on that list. To the extent that it is --

MR. YALOWITZ: Right, same thing, we'll check it and -- okay, we'll check it, and if it is, we'll keep it in, and if it's not, we'll take it out.

THE COURT: 69, the same thing, it's an indictment.

70 is a sentence. Same thing, same rule applies. So those would be out.

Now, I had some issues with regard to several other exhibits. As I said, to the extent that the defendant objected to a portion that wasn't the portion that the plaintiff said that that's the relevant portion they wanted admitted, I'm going -- my default position is going to be, it's out. To the extent that you have disagreements, and I am not identifying it as one of the items here, that means I resolved it as being in, it can come in.

130 --

MR. YALOWITZ: Help me on it, Your Honor. It's not page ordered. I found it.

THE COURT: 130, all of the objected-to statements should be redacted out except the portion where it indicates that he worked for the police force in Bethlehem, the military activities on behalf of the Fatah movement, and the aforementioned was active in the Fatah movement. All of these other have double hearsay problems. The portions that you said

you wanted --

MR. HILL: Your Honor, may I be heard on that?

THE COURT: Yes. Let me just finish the statement.

MR. HILL: I'm sorry.

THE COURT: The portions that you wanted on page -- I'm sorry, let me just make sure I have this right.

The portions that you wanted on the -- the first three portions all are statements by this person made someplace else. Unless you have some argument that those statements are somehow -- there's an exception to the hearsay rule, all of those -- most of those are statements by that person that's in this report.

MR. YALOWITZ: I'm sorry, are you looking at my side of the chart --

THE COURT: Yes.

MR. YALOWITZ: -- or the defendants' side of the chart?

THE COURT: Yes, your side of the chart. The GIS report re -- you're saying that the report says this?

MR. YALOWITZ: Right.

THE COURT: Okay, not --

MR. YALOWITZ: I'm quoting the report. Like the financial status of his family is good, that's a conclusion by the defendants.

THE COURT: Wait a minute. Let me make sure I have

this right.

MR. HILL: Your Honor, I hesitate to interrupt, but if the issue is whether the statement of financial status of his family is good can come in, that's not one I lodged an objection to.

THE COURT: Okay.

MR. YALOWITZ: Yes, this one is a little tricky because there's not a good match between the two sides of the chart.

THE COURT: Let me just remind myself where I was on this.

MR. YALOWITZ: Like they've got an objection to this text, "During his confession, Ahmed Sala implicated him," "him" being the subject of the report. I don't have a problem with that coming out. That's they're reporting that some other guy implicated --

THE COURT: Where are you looking?

MR. YALOWITZ: If you look on the --

THE COURT: Oh, yes, I have those last three items.

MR. YALOWITZ: Those can come out.

THE COURT: The Sala statement and the other two that they objected to that you didn't indicate that that was the portion that you wanted, I have that that portion is out.

MR. YALOWITZ: Right, I'm fine with that.

THE COURT: Okay. Now, with regard to the one before

that, my notation has that I thought that it can come in.

MR. YALOWITZ: Right. Okay, we're together on that.

THE COURT: And I think I misread the first three, because I have circles that he states, but you're saying that it's not -- well, yes, it says he states that.

MR. YALOWITZ: Where are we looking?

THE COURT: GIS report re -- okay, you're saying the report states or he states? That was my confusion.

MR. YALOWITZ: Yes, the report states.

THE COURT: Okay.

MR. YALOWITZ: We can look at it and come back to you because I understand the ruling, and I'm fine with it.

THE COURT: My concern is, if it was just his statement to them, then I thought it should come out, but if you're saying that the report just alleges these facts about him, then I agree with you, that it's not inadmissible on that basis. I think that it's relevant to -- unlike the employment reports, which I think more directly come in with regard to being offered for the truth of the fact that they were provided by them and during this period of time, these GIS files are more -- I think they have a different relevance, they come in because it indicates the kind of information that was available to the PA and the PLO at the time about these individuals, and what they believed about these individuals at the time is just as relevant to what was true or not true about these

individuals.

So if they had this information -- and I think I used this example -- a bad example, but I used the example as I was discussing this with my law clerk -- if I said that we need a babysitter, and I'm getting ready to deliver the person to the babysitter, and somebody comes to me and gives me information that the babysitter is a child molester, it is relevant to my decision as to whether or not I'm going to hand the kid over to this person, whether it is true or not. The fact that I have that information, and I take an action that is either consistent with my being concerned about that or consistent with my accepting that as it doesn't really matter whether it's true or not, is relevant determination. So this is the information, obviously, that the GIS gathered about this person. This was the information that's in their files. Obviously, one logically can say, and a jury logically can say, if somebody asked the PA or the PLO about this individual, it would be legitimate for them to go to the GIS and say, what do you have on this guy, and they would say, we have this kind of information.

Now, whether it is true or not is secondary as to whether or not they had knowledge or belief about this information. So to the extent the information alleges, says -- and I made that distinction -- that X says something about him in a context where it's obviously just restating the fact that

X says something, it still may or may not be admissible, but the fact is, it just simply states that fact in the report. It doesn't matter to me where they got that fact from, it's obviously put in the report in the context in which they have this information. And there's nothing about the way they've stated it that's saying that they're challenging the information, or they think this is suspect, or they're not using this information, because they're filling it in. A lot of these are forms, they fill in something on the form. If they fill it in on the form, one can't argue that you can't say that obviously they had that information at the time about this person, and they recorded that information for themselves and their records. That's my view and approach on those kinds.

MR. HILL: May I be heard very briefly?

THE COURT: Yes.

MR. HILL: Because I think Your Honor's analogy is apt if we're talking about an individual, but here, we're talking about an organization.

The knowledge that's reflected in the GIS files is, under Palestinian law, a state secret and cannot be shared outside of the GIS. So to vary the hypothetical slightly, assume Your Honor is hiring a babysitter, you're an employee of the federal government, assume that the FBI has information that your prospective babysitter is a child molester, the FBI doesn't share the information with you, indeed they would be

prohibited by law from doing so. Now, it's not relevant to the question of your negligent hiring of the babysitter because it's information that you as an employee of the federal government cannot access.

THE COURT: But that's an issue that you can raise, but I don't have any evidence to that effect. I don't have any evidence that somehow the GIS files are not available to the president of the PA.

MR. HILL: Well, they're available to the president of the PA, but the president's conduct is not at issue here. The conduct that's at issue are payments, as I understand it. And the timing is also important. The timing of this document is August 17th, 2007, so this is more than -- let me see the name of the person on the file -- this is more than three years after this person allegedly committed the crime, and this is in a secret intelligence file.

You do have this in the record because it's in the declaration of Majid Faraj, which is an exhibit to our opposition to the motion to overrule the objections.

THE COURT: Okay.

MR. HILL: So this is a situation where the information Your Honor is thinking is relevant, because it's relevant to PA decision-making, is, in fact, isolated by law within a component of the PA and cannot be accessed by the other portions of the PA, the basis of which the plaintiffs are

claiming there's some indication of liability for payments or promotions and so forth?

THE COURT: I know, but that doesn't preclude -- as you already said, it doesn't preclude a number of people who are officials of the PA having access to this information, and the GIS is part of the PA.

MR. HILL: It is, Your Honor.

THE COURT: So to simply say that it's part of the -- the GIS is part of the PA, but it's secret to just the GIS doesn't take away the responsibility of the PA if the information is within a PA agency. Even if the PA agency is not sharing it with another part of the PA, it's still part of the PA, the PA has this information.

MR. HILL: But it has it post hoc. This is information it has three years after the event, which is not going to be probative of whether this particular person was engaging in this as part of his employment. The fact that this information is in the secret intelligence file of the intelligence branch for whom he did not work three years after the fact is not probative. The only issue that the jury is going to have to consider, which is, was it his job, was he ordered to engage in this particular attack.

THE COURT: But you'd have to give me an example of that, because as I look at the facts themselves, it doesn't matter, the timing doesn't particularly matter. What fact do

you say would be not a relevant piece of information that is somehow untimely now because they're putting it in a later report? If you want to argue that they didn't know this until they wrote the report, that's an argument to make, but I'm not sure that --

MR. HILL: This is all about reports of detentions and convictions by Israelis which necessarily happened after the fact.

THE COURT: I know, but --

MR. HILL: Frankly, this is just an echo of the Israeli process. This is recording hearsay of the Israeli military corps process. It's knowledge after the fact, which is secondary, and it's not going to be probative of the issue of was it this individual's job to commit the crime that allegedly injured these plaintiffs.

THE COURT: See, I don't have the information to cross-reference. I don't know -- when was he supposedly -- what was the period of employment?

MR. HILL: This individual was allegedly involved in the bombing that took place in January of 2004, and he was allegedly arrested by the Israelis shortly thereafter.

THE COURT: And what was supposed to be his period of employment?

MR. HILL: Well, it would have terminated no later than when he was arrested.

THE COURT: I know, but how long was he employed?

MR. HILL: For how many years prior to' 04? That information is in the record. I don't have it here.

THE COURT: What is his relationship to one of these acts?

MR. HILL: He is allegedly one of the conspirators in the January 2004 bombing.

MR. YALOWITZ: But wait a minute. He's still on the force today, Your Honor. He's still on the force. He's getting promotions, he's getting his monthly pay. And if you read a document in your files that says one of our employees is a homicidal maniac, and then you say he's good in terms of security and morals, that seems like evidence that goes to the jury about whether he was acting within the scope of his employment.

MR. HILL: My point is that this is a secret file that the so-called employers, people making decisions about promotions and payments, can't access.

THE COURT: It's not a question of who is making decisions about --

MR. HILL: You're trying to discern the state of mind, if you will, of a corporate entity, of a nonreal person.

THE COURT: Right.

MR. HILL: And so we're all familiar with the notion that the right hand doesn't know what the left hand is doing.

THE COURT: But there's also a notion that that's not a defense. To say that they knew this over in corporate, but they didn't know this in personnel is not a defense to --

MR. HILL: For the organization to be liable, the organization has to make a decision, and the people that are making the decisions about the events that Mr. Yalowitz is pointing to, promotions and payments, are not the individuals that have the information that's in the secret intelligence file, and that's why it's not probative of whether the fact of continued payment or continued promotion is somehow reflective of --

THE COURT: I can't accept that, because obviously, it would -- the jury can consider that, if you have such evidence, but the jury -- it's not a particularly compelling argument to say that, well, the GIS is the intelligence arm of the PA.

MR. HILL: And learned after the fact that this person's alleged involvement in the crimes.

THE COURT: Okay. But after the fact, I understand your argument, I can give that further consideration, but they have information that this person is involved in a violent act, a terrorist act. Despite that, the GIS having that information, no one, in making decisions, at best that you can argue, no one, in terms of making decisions about whether or not this person can continue to be employed, factored in the fact that he was convicted or accused of this terrorist act.

MR. HILL: Well, the latter can be proved without the GIS file. The only thing we're arguing about here is whether the GIS file should come in and what probity, if any, it has. I'm saying it doesn't have any because the people that are making decisions about promotions and payments are not the people with access to this information.

THE COURT: But isn't it a jury question as to whether or not that, in itself, is reasonable, that that's reasonable and plausible, that the GIS -- that you want to put on someone who says the GIS would never let the people know who ultimately had responsibility for continuing to hire this person, that this person -- that they had information that this person was committing terrorist acts?

MR. HILL: Your Honor, I think it's very problematic for the jury to decide that the PA's intelligence law is a basis for liability. We would never have a trial --

THE COURT: I don't know, you have to give me where the intelligence law is.

MR. HILL: The intelligence law is appended to the declaration of Majid Faraj, which is attached to our opposition --

THE COURT: What do you say it says?

MR. HILL: It says that the files of the intelligence are state secrets and may not be shared with anyone without order of the president.

THE COURT: Right. So it can be shared with the president, and it can be shared with others by order of the president.

MR. HILL: Just like our intelligence files, no one would ever go to trial on the theory that the EPA is liable for doing something with an employee because the CIA had information on --

THE COURT: That's right, but that's not what we have here. You're not the EPA and the CIA, you're the EPA and the U.S. Government. That's the difference. Yes, you would find the U.S. Government responsible if the EPA knew regardless of whether they could share with another agency in the U.S. Government.

MR. HILL: Your Honor, I don't believe the corporate knowledge doctrine can function in that fashion.

THE COURT: Well, but that's the example you just gave me. You said EPA and CIA. This isn't the EPA and CIA. This is the CIA and the government, as you say, for which the CIA works. That analogy doesn't work.

MR. HILL: It's not the president of the PA that's making payment decisions --

THE COURT: It doesn't matter. It's not the President of The United States that's making payment decisions to people, but if the CIA has the information, and the President can be privy or is privy to that information, and he's not directing

the EPA not to hire this person because this person is already convicted of environmental violations, it would still be on the responsibility of the United States Government to do something about it. They can't insulate themselves by saying the President put on blinders. I don't think that that's the argument you can make.

So if your argument is simply that it should be excluded because the GIS, which works for the PA, doesn't share the information with anybody other than whoever the president tells them to share it with, I can't accept that as an argument, as excluding it as not knowledge of the PA. It is knowledge of the PA.

Now, whether you want to reasonably argue that it doesn't mean that the PA or people making decisions in the PA about employment had that information and factored in that information when they continued his employment, so you can't infer that they knew this when they continued to employ them, but I think you even concede that pretty much, it was more than just secret knowledge that these people were convicted of --

MR. HILL: That's precisely my point, is that if it has any relevance at all, it's marginal probative value of knowing what somebody in the GIS knew three years after the fact about whether someone had been involved in a crime. That marginal probative value --

THE COURT: No, I understand that.

MR. HILL: -- is outweighed by the unfairly prejudicial effect not only in this court, but of revealing the client's intelligence files. These are things that are state secrets under the PA's law. This is an organization that's in security coordination with the United States, with the government of Israel. There's a real problem with the Court saying we're going to let the jury see the secret files of the defendant, particularly where we're talking about an issue here where they don't really shed any light on whether the defendants are going to be liable. The PA is not going to be liable because somebody at the GIS wrote this down three years after the fact. That's not going to create liability.

The only thing it could do is could conceivably allow, as the plaintiffs are apparently going to argue, an inference that this was in the scope of employment. But the fact that somebody wrote it down afterwards that someone committed a crime or that they allegedly did it in association with some particular organization, that's going to have very little probity to the real issue, which is were they ordered to do this as part of their job.

THE COURT: Well, part of their argument is that it is also consistent with the fact that even if that were the case, having known this information, even subsequent information, that they continued this person's employment, and they continued this person's employment, they would argue, because

this is exactly what they expect this person to do, hired this person to do within the scope of this person's employment, and they had no concern about this person being convicted of --

MR. HILL: If that's the theory, there will be evidence of that apart from the intelligence files. I'm trying to focus on the intelligence files. These are, at best, cumulative, at best, very marginally probative, but they are highly prejudicial, and they are state secrets under the PA's laws.

THE COURT: The problem is that your state secrets argument would be a stronger argument about withholding their production, not a stronger argument that it's disclosed in discovery, but now the jury can't see it. That's not a real strong argument.

MR. HILL: Your Honor, just so we're clear, we did object to producing it.

THE COURT: I know, and you lost.

MR. HILL: And they were produced over our objection because the PA is participating in the lawsuit, and --

MR. YALOWITZ: May I be heard on this?

MR. HILL: But that doesn't waive the objection --

THE COURT: Wait a minute, slow down.

MR. HILL: -- that publicly disclosing them will injure the PA by revealing material that is a state secret under its own laws.

THE COURT: It doesn't protect them from revealing the information because the information would indicate that they're in violation of the ATA. There's no compelling reason to say, well, we should protect them from a violation of the ATA or a violation of the ATA can be established because they consider this to be secret.

MR. HILL: This information will not establish --

MR. YALOWITZ: Your Honor, may I be heard?

THE COURT: You can be heard fully, but let me finish.

MR. HILL: This does not establish an ATA violation. This is something that's written years after the fact. It cannot be proximate cause, it cannot be material support. There's only this attenuated theory that somehow someone could infer an order, or a direction, or scope of employment from this evidence, and that is a weak inference at best, and the prejudicial effect outweighs it. And so even --

THE COURT: I'm not sure -- articulate one more time what the prejudicial effect is.

MR. HILL: First of all, the jury is going to hear, and the jury is going to have a hard time sorting out because it's three years after the fact.

THE COURT: Why not? You explained it very clearly to me. I don't know why -- I'm not more intelligent than the jury to understand that part of it. That's pretty simple.

MR. HILL: We're still prejudiced by the plaintiffs

throwing up on the screen and telling them their own files show that they know they're terrorists.

THE COURT: What's unduly prejudiced about that if that's the truth?

MR. HILL: Right. It's also going to unduly prejudice --

THE COURT: Why does that unduly prejudicial if it is, in fact, persuasive and true?

MR. HILL: You've got to weigh them against each other. So the probative value is almost nothing, so a very minor amount of prejudice will outweigh that.

THE COURT: Well, the problem you have is that you can argue that the intelligence files are confidential, but the intelligence files have a purpose, they have a legitimate purpose, and that legitimate purpose is to protect the interests of the PA. And so it's kind of -- it's more difficult for you to argue just because they say they want to -- that these are secret, that these aren't what they purport to be. They are files, they're investigations of an intelligence --

MR. HILL: They're not investigations, Your Honor.

THE COURT: Well, then what's the secret nature of the information if they're not investigations?

MR. HILL: They're information gathered from public and secret sources.

THE COURT: Well, that's an investigation.

MR. HILL: It's not an investigation, this is intelligence. This is not a law enforcement investigation where the PA went out and decided to figure out who did this crime.

THE COURT: Well, I don't know your definition of investigation. I'm not quibbling with some technical -- what did you say it was?

MR. HILL: It's an intelligence file. They gather information on people, and they write it down.

THE COURT: The intelligence that they are gathering is gathered for the purpose to protect the interests of the PA.

MR. HILL: Yes, it is.

(Continued on next page)

THE COURT: So you cannot argue that somehow the PA does not have an interest in gathering this information and utilizing this information and making important decisions that the PA has to make. And one of those important decisions is whether or not they're going to employ people who are convicted of or continue to compensate people who are convicted of committing terrorist acts in Israel.

MR. HILL: There is no evidence that GIS information is used for the purpose your Honor described.

THE COURT: Well, that's fine and dandy, but that in itself raises a question, if you had that information, why you wouldn't use it to make those kinds of decisions, and they would argue they would use it because they don't care. You would argue that they don't use it because they keep it secret and they don't want to discuss it, but that's not a compelling reason.

It is intelligence gathering for the PA, for the benefit of the PA, for the PA to use it as the PA feels fit in its best interests. They have made a determination, and you argue that they did not feel fit to use it to not hire people who were convicted or who have been accused of these terrorist acts. They didn't use it for that purpose. Now, whether there is a good reason they didn't use it for that purpose or a bad reason they didn't use it for that purpose, that is for the parties to argue. I don't --

MR. HILL: Your Honor, there is no evidence that someone was hired in the face of information --

THE COURT: No, not hired but that they were not terminated. They continued to be employed. That's their argument. They continued to employ them even though they knew that these people had either committed -- in fact, committed -- or had admitted to committing, or had been accused of committing the terrorist acts that are at issue here.

MR. HILL: If somebody wrote that in a secret file, hearsay that these people have been involved in attacks, that's what we've got --

THE COURT: No, not somebody; somebody on behalf of the PA --

MR. HILL: Wrote down hearsay, yes, your Honor --

THE COURT: The PA wrote that down.

MR. HILL: Yes, the PA's employees, whose job it is to record --

THE COURT: Right. Well, that is true of any corporate responsibility --

MR. HILL: Yeah, but that doesn't mean that hearsay comes in. That's where we are.

MR. YALOWITZ: Actually, it does.

THE COURT: It is not hearsay. It is the information that you record.

MR. HILL: It is not being offered to prove that he,

in fact, was involved in Fatah?

THE COURT: It is being offered to prove that you thought he was involved in Fatah because that's what you put down. You believe he was involved in Fatah.

MR. HILL: Why is the fact that we believe he was involved in Fatah relevant? It is not.

THE COURT: Because if you believe that he was Fatah and --

MR. HILL: Your Honor, many people --

THE COURT: -- it goes to your knowledge of how you acted in the face of believing that he was a member of Fatah.

MR. HILL: Your Honor, Fatah is a political organization. It is like the Republicans. Many people who --

THE COURT: Then, what are you complaining about if it is like the Republicans? What, you don't like Republicans?

That's a double argument. Either you say that that is some evidence that he is involved in terrorist activities and you want to argue to the jury, which you're perfectly able to do, that just because he is a member of Fatah doesn't make him a terrorist, and just because we know he is a member of Fatah doesn't mean that we're approving of his activities and --

MR. HILL: It is not relevant. It ought to be excluded. It is prejudicial to the client to have their intelligence files shown to the jury.

THE COURT: Let me hear from you --

MR. YALOWITZ: Okay. Thank you, your Honor.

Let me just recite the facts about what happened with the GIS files. Magistrate Judge Ellis made a ruling in July of 2013 that the defendants had not justified their claims of state secret privilege or whatever their claim is. The defendants did not object to that ruling. They re-argued it to Magistrate Judge Ellis. They said, well, we would like you to reconsider. Magistrate Judge Ellis reconsidered and adhered to his ruling in, I think, November of 2013. The defendants didn't object to that ruling, either. He said, they're not privileged, they are relevant, you got to produce them. So as I read Rule 72 and as I read Second Circuit law, their objection to these documents being turned over, made public, all like that, that's been waived.

Now, they may have a different issue about confidentiality, like it would compromise law enforcement techniques or something, okay. If they had an argument like that, we could talk about it, but this idea that like they have a blanket state secret and the documents are protected by that, Magistrate Judge Ellis rejected that, and these defendants didn't bring it to you, so they are done on that issue. They can't get further review on that issue.

They have gone running to the Court of Appeals saying this is a big emergency because of our state secret privilege, and they didn't even bring it to you back when it mattered when

they could have brought it to you in a timely fashion.

So, one of the things that I need to do tomorrow -- and I kind of need your help on this if you can help me out -- one of the things I'm going to do tomorrow is I'm going to give the Court of Appeals an example of what we're talking about, not only because Judge Ellis made a ruling that the defendants acquiesced in it, but also because if you look at the documents -- and I know you have spent a lot of time looking at these documents, there is no law enforcement. It is not like they have informants that if the name comes out somebody could get hurt. It is not like they've got special wiretapping technology that's being disclosed. I'm looking at 142, which I gave to defendants over the lunch break. 142 is about Ahmed Barghouti. He was convicted on more than 50 counts of criminal activity, and they say in this report, based on the report of the political security, which stated the following, here is our information about it: "He was born in Jenin and lived in al-Bireh, but he currently is in prison." Okay, that is not a state secret.

"He used to work as Brother Marwan al-Barghouti's bodyguard, but he was arrested by the Israeli occupation forces and was sentenced to 15 life terms plus 50 years. He is currently serving his prison sentence in the Al-Naqab Prison." Well, that is not a state secret.

Then, they say, "The aforementioned is good in terms

of security and moral." That is not a state secret.

That is the text of the report that they're saying requires mandamus to protect.

I want to give this to the Court of Appeals, and the issue is: Can I do that consistent with your Honor's confidentiality order, or do I need to go and file a motion to file under seal in the circuit?

Then, the other thing I want to tell them is that this guy, Ahmed Barghouti, since his arrest has been kept on the payroll as a member of the police force, and he has been promoted twice since the attack in this case. That's just in my little summary chart.

THE COURT: I'm not even sure what relevance that has on the issues before the circuit.

MR. YALOWITZ: Because the total issue on mandamus is irreparable harm. They have got to show the circuit that absent an intervention before trial, there is going to be some serious irreparable harm. Otherwise, they have to get in line, wait until their final judgment, and then they can go appeal, just like everybody else. So their argument to the circuit for irreparable harm is, oh, we got these important state secrets, we're an important almost-state, and because we're an important almost-state, we have important almost-state secrets, and if you let Judge Daniels try this case, he is going to let the cat out of the bag and destroy our state secret secrecy.

If you look at the documents that we're talking about -- I know you have -- it goes beyond malarkey. I want to show this to the circuit. I'm going to show it to the circuit tomorrow. The only question is: Do I have to go through the shuffle and pony show of saying these things are protected by confidentiality. We're in the district court, which the Court has already ruled they're admissible. I thought we were going to be beyond it, and maybe we are. But the question is: Can I file these publicly, or do I need to go make a motion to file it under seal?

THE COURT: Did you want to say something?

MR. YALOWITZ: It's just logistical.

MS. FERGUSON: Your Honor, first, there were multiple grounds on the irreparable injury part. The focus is on the confidentiality. Currently, they are under protective order. So that's the issue, and I do very much object to cherry-picking a particular exhibit and passing it off to the Second Circuit as representative of the entire collection of documents.

THE COURT: That is a different issue. That's not an issue of whether or not it is disclosable.

MR. YALOWITZ: I will offer to the defendants, any GIS document they want me to put before the circuit, I will put it before the circuit tomorrow if they get it to me by the close of business today.

MS. FERGUSON: The risk of harm comes from any particular GIS file that might contain identification of sources.

THE COURT: I'm not going to make any ruling today for the submission tomorrow that is going to change the status quo of how documents are being treated. We still have issues to address, and the press is still knocking on the door saying that they want to see documents. I have to be sensitive to the fact that some documents may not end up being admissible at trial and may not be appropriate to further disclose. I'm still evaluating that to see where we are when we get close to trial. If you want to characterize the nature of the evidence, you can do that. If you want to ask the Court to look at it in confidence under seal, if they want to do that, they can do that, too. They have the full authority to do that. It doesn't violate the confidentiality, but I'm not going to make a ruling now that says that you can file it in a form that will be public and disclosable by anyone who wants to search the filings in that case.

MR. YALOWITZ: Does your Honor have a problem with my including just the text that I recited in open court today?

THE COURT: I do because I don't know the consequences --

MR. YALOWITZ: Fine. Then, I will move on. That's fine.

THE COURT: -- you could argue about whether or not you really need that. Quite frankly, I don't think that's the thrust of their argument, the main argument that they're making here, nor do I think that that is going to be a determining --

MR. YALOWITZ: I don't think it is going to be --

THE COURT: -- factor as to whether they want to take this before or after the trial --

MR. YALOWITZ: I agree. That is their argument. I will deal with it with the circuit.

Okay. Thanks.

THE COURT: There were a couple of things that I was going to rule on; 130, 131, and 134. Let me look at that more carefully. In light of this discussion and in light of my rereading of the statements, I may have a different view. As I say, my position in general is the belief of the PA or the PLO, as reflected, and the knowledge and belief as reflected by any information that is in the possession of the PA or PLO has some relevance in this case and has some relevance on their mental state, their state of mind, how they act consistent or inconsistent with having that knowledge. In the abstract, I think that that kind of information is relevant and admissible at the trial. Just because the information is subsequent information received does not make it not relevant. I will still have to weigh its probative value as to any potential prejudice, and it may be so remote in time that it is clear

that they received it at a point in time where a reasonable inference couldn't be drawn from that. For the most part, most of this information, it is information that the PA had in its possession, and the PA utilized that information and took acts that the parties can argue about whether it is consistent with participation or some intent or approval of the acts of its employees or agents or that it is somehow simply isolated, which it would be unusual for the jury to conclude that this information was within the universe of knowledge that the PA had in making its decisions about how they would deal with issues associated with those accused, admitted, or convicted of these terrorist acts. I will look at it closely, but at this point, I'm not compelled that GIS files, simply because they considered them to be confidential intelligence files, that that in and of itself gives it some greater protection so that the jury should not be able to hear this information, particularly in light of Judge Ellis' rejection of that argument when that information was produced. Obviously, if there was such protection, it would have protection from disclosure to the plaintiff, as well as protection from disclosure to the jury. I'm not sure that we understand how it would be available and unprotected from the plaintiffs' eyes but somehow protected to be withheld from the jury's eyes. I will review that.

I'm going to skip to 135. 135 needs to be redacted

because 135 has a statement -- all of the statements except one are in. The statement, the third box on that second page of 135, talks about Salah. The phrase starts, "during his confession," and it says he implicated someone else. Consistent with what I have already ruled, that is not admissible; that he, during his confession, implicated a third party. I think that has to be redacted.

Then, I'm going to skip to 164. Most of the information that is recorded I believe is appropriate except I don't believe that -- with regard to the second box on the second page of Exhibit 164, apparently this information being quoted out of a newspaper, the information in that newspaper is not admissible for the truth, so that is to be redacted. I don't see any other legitimate purpose for offering that newspaper, particularly given the nature of the comments.

Then, 317(a), not a big deal --

MR. YALOWITZ: Where are we?

THE COURT: 317(a). You have to go back to page 97.

The last statement -- I don't think this is a big deal either way -- but the last statement on that page with regard to dividing the allowance between the two wives, I don't think that that has much probative value. As slight as the prejudice might be with regard to that, I think the probative value is even slighter.

MR. YALOWITZ: That is fine. You will see a picture

of them, and you'll be surprised at the two wives, your Honor.

THE COURT: Nothing surprises me.

I think there are other indications in there that payments were made and that sort of thing. The relevant portions are there.

I will go back and review 131 and 134 and 135 again, but other than those items, I think that everything else that I have reviewed that's in dispute, direct conflict between the parties, I believe that it is admissible, and there is a legitimate reason for the jury to hear it, and for the parties to argue what they will as to what reasonable inference should be drawn from the fact that this information is found in the files of the PA's GIS, except for those portions, as I said, that defendants objected to, which were not the designated portions that the plaintiffs indicate were the relevant portions that they wanted to admit for a particular purpose. Those documents are to be redacted in that manner.

If there is something else that I have missed or something else that should be compelling for me to change that determination, you can let me know by letter quickly, and then I can evaluate it or reevaluate it, but that's my ruling with regard to the documents.

Now, let me just quickly give you some idea of where I am with regard to the motions in limine, although we weren't really going to resolve all of those today, but I want to give

you some guidance. I could tell already that some of these are no longer at issue. I think a lot of the plaintiffs' motions are no longer at issue because I think the defendants have agreed that's not going to be part of the case. I'm just going to categorize it this way: The plaintiffs basically object to any evidence of alleged mistreatment of Palestinians by the state of Israel. My understanding is that the defendants do not intend to offer such evidence. Is that correct?

MR. SATIN: I think our position is that that is correct provided that they're not permitted to introduce the same kind of reciprocal; that we were going to do it if they don't do it themselves first.

THE COURT: Does the plaintiff intend to do that?

MR. HORTON: Unless the door is open, I don't anticipate a need for that. It's not quite clear what the "that" is.

THE COURT: Do you intend to offer evidence alleging mistreatment of Israelis by Palestinians --

MR. YALOWITZ: Yes. Our clients were blown up by suicide terrorists.

THE COURT: I didn't finish.

Other than the acts at issue in this case?

MR. YALOWITZ: No.

THE COURT: That will be out for both sides. That is easy to resolve.

This is what I'm going to do: Since I have allowed the Israeli military court conviction, I'm going to allow the defendants to present evidence, if they have such evidence and they want to present that. The jury shouldn't rely on those convictions if they don't have such evidence to present. Plaintiffs can present evidence, I think they have a recent expert who wants to testify, that this is a process that is consistent with due process and it's a legitimate process that the jurors should rely upon. If you debate about that issue, then that's an issue for the jury to resolve.

MR. YALOWITZ: So I have no problem, your Honor, with the defendants saying I don't think that Abdullah Barghouti got due process because he didn't get an adjournment on such-and-such a day or he didn't get crunchy peanut butter or whatever their arguments about the lack of due process. I have a serious problem with the defendants coming in and saying the Israelis engage in torture all the time, and so you can't rely on the military courts, or the military court system as a whole is a kangaroo court because the officers are in uniform.

THE COURT: What do you want Mr. Kaufman for? He is saying just the opposite.

MR. YALOWITZ: I want Kaufman to present the convictions, summarize some of the salient facts.

THE COURT: I thought you wanted him to testify about the quality of justice in Israeli military --

MR. YALOWITZ: I don't need it. I'm perfectly happy to say these people were convicted, here is what they were convicted of, Mr. X received due process.

THE COURT: Mr. X received due process. Who is supposed to testify to that?

MR. YALOWITZ: Kaufman can testify.

THE COURT: If he says that, you're saying I shouldn't allow them an expert that testifies that he didn't receive due process?

MR. YALOWITZ: I have no problem with them bringing an expert to say that someone convicted didn't receive due process. I have a big problem with them saying the military courts are fundamentally unjust because they reflect an apartheid state.

THE COURT: My reaction is this: As I say, a lot of the issues you want as early as possible and even want them at summary judgment, but quite frankly most of these issues are issues that usually don't get resolved until you have a context in which to resolve them --

MR. YALOWITZ: I agree.

THE COURT: -- and see what the witnesses have to say and what issues and what arguments are being made to the jury.

MR. YALOWITZ: Right.

THE COURT: If you are going to offer any evidence about due process in Israeli courts, you will open the door to

their putting on whatever evidence they want to put on about the lack of due process in the Israeli courts. I'm not sure I have to turn to them to find out, if knowing that, if you decide to avoid that, whether or not they still want to put forth their experts to argue that there is not due process in Israeli courts.

MR. YALOWITZ: I will not open the door.

THE COURT: What does the defense want to do?

MR. SATIN: It is our position that we're permitted to do so whether they open the door or not.

THE COURT: What do you want to do, is the question. Because the convictions have nothing to do -- for example, he used an example about torturing in confessions -- that has nothing to do with the due process of whether or not somebody is legitimately convicted in this case or whether or not their plea of guilty was a legitimate plea of guilty. I don't know how you tie it to any particular case other than wanting to throw mud in general at the Israeli justice system, and so that means that somebody who stood up in open court and said, I committed this act, that you're trying to say somehow the jury should believe that he didn't commit this act.

MR. SATIN: Well, there are a couple of different things here, your Honor. First of all, there are allegations of torture within the cases themselves.

THE COURT: What does that have to do with this case?

How does that make it --

MR. SATIN: If there are allegations of physical abuse that was conducted on the individuals who were convicted --

THE COURT: To what result that you say the jury should factor into their assessment in this case?

MR. SATIN: In assessing the reliability of those convictions. The rule by which the government --

THE COURT: Tell me who it is you believe was convicted that you believe was innocent.

MR. SATIN: Who was innocent?

THE COURT: Yes. It attacks the reliability of their conviction. Obviously, most of the people stood up in open court and said they did it. You're saying the jury should be suspect of that. Are you saying that they didn't do it?

MR. SATIN: Well, I think there are a couple of different issues here in terms of innocent versus not. I'm surely not in a position to say whether or not a person was, in fact, innocent.

THE COURT: I'm trying to understand what relevant context you want to throw this into the soup.

MR. SATIN: In trying to show that the convictions themselves may not be reliable such that the jury may not trust them as being true and it may be --

THE COURT: Which ones are you asking them not to trust as being true?

MR. SATIN: I don't know if I have a list in front of me.

THE COURT: Do you have an idea of whose convictions are suspect and whose convictions aren't suspect? And do you intend to offer some evidence relevant to that particular case?

MR. SATIN: To a particular case to show that that person wasn't? I mean, I could go back and look at my notes and figure out which ones they are. But I think the issue is the rule by which they are seeking to admit these convictions, Rule 803-22, it says that the evidence comes in. It is not conclusive that it's true. The parties can litigate whether or not it is reliable or not.

THE COURT: Right.

MR. SATIN: In fact, the cases that they themselves have cited for the proposition that these come in say, when there are problems with the military courts -- I forget if it was the Strauss case -- problems, that goes to the weight of the evidence --

THE COURT: I'm still not sure what it is you want to demonstrate about the Israeli court. You shouldn't trust the convictions because they likely tortured a false confession out of one of these defendants? Is that the inference that you want?

MR. SATIN: Well, they're using torture because it is the most extreme case.

THE COURT: Give me a different case, less extreme. I don't know what it is that you want to say to cast doubt on the conviction in these cases.

MR. SATIN: The Court want to know specific --

THE COURT: Give me an example. You said not to use torture.

MR. SATIN: Another example would be conflict of interest. You have two defendants represented by the same attorney. When I say two defendants, two individuals charged in connection with the same incident.

THE COURT: How would that imply that their confession or admission or plea of guilty is false?

MR. SATIN: I think the one that I'm getting to -- and I was not talking about in the context of torture -- but you had two individuals charged in connection with the same offense represented by the same attorney.

THE COURT: Okay.

MR. SATIN: And one --

THE COURT: Happens here all the time.

MR. SATIN: -- one --

THE COURT: That's not unusual.

MR. SATIN: That was just the lead-up. One client was convicted based upon evidence from his same attorney's other client.

THE COURT: Okay.

MR. SATIN: You don't have that in this court. I have never seen that.

THE COURT: That may be unfair, but what about that makes the confession unreliable or the conviction unreliable?

MR. SATIN: That shows that he did not have an attorney representing him that was free of a conflict of interest such that he received effective representation.

THE COURT: Are you attacking someone's trial, or are you attacking someone's plea?

MR. SATIN: This is a trial. Someone went to trial. They're convicted. And it turns out that the very lawyer that was representing him was also representing another individual charged in connection with the same offense for whom that evidence for that individual was used to convict him, the person who was convicted.

THE COURT: Your position is that that person didn't do it?

MR. SATIN: Well, that is a separate question.

THE COURT: That's the important question, isn't it? That's all they want to establish, that this was the perpetrator of the crime.

MR. SATIN: That they cannot rely on that conviction for the purposes of showing that they did. Whether or not I have a true halo over my head and have sufficient information to say whether this person was factually innocent or not, I

don't know --

THE COURT: I will look back at your submission, but what is the nature of the testimony that you want to offer?

MR. SATIN: So I think there's a couple of different things. Even through their own witness talking about what happened in those cases -- in other words, this person was convicted of this event and that event -- we should be permitted, since they're offering that evidence, to cross-examine that witness both on the things that happened in that case that cast doubt on the reliability of that conviction but also systemic problems. You cannot divorce the two.

THE COURT: What evidence of systemic problems do you have?

MR. SATIN: You have lawyers whom are ineffective for some of the --

THE COURT: You have a direct circumstance that you are pointing to, or are you going to have some expert stating his opinion --

MR. SATIN: We also have --

THE COURT: -- generally about what he thinks that the case --

MR. SATIN: Well, I think there's circumstantial evidence. We can lay out, for example, that the lawyers practicing there, they don't have to pass a bar exam, they're not even required to take a language exam to represent them.

So we're going to have a number of problems.

There have been studies done on this very system during the relevant period of time that have found, to quote, "severe shortcomings and failures in the delivery of due process" --

THE COURT: Okay.

MR. SATIN: -- to those individuals. So the jury should be entitled to hear either through our cross-examination of their expert or through our own expert --

THE COURT: They're only entitled to hear the parts that you say go to whether or not the conviction or confession was reliable or not.

MR. SATIN: You cannot --

THE COURT: The fact that there isn't all of the same due process there as in the United States doesn't in and of itself -- every country has its own process -- it doesn't in and of itself make the conviction unreliable. That's that. We have a Fifth Amendment privilege, but many countries don't, they don't have a Fifth Amendment privilege. That doesn't make the convictions unreliable.

MR. SATIN: Right, and it would look really silly if we got up there and we started eliciting about the differences, minor differences, between our country's system of justice and theirs.

THE COURT: Tell me, to the extent that you want a

side show with regard to the justice system. Are you just talking about the military justice system? Are you talking about something other than the military justice system?

MR. SATIN: The military justice system, that is what is at issue here.

THE COURT: So you don't intend to offer evidence about the weaknesses in the civil system? You're talking about the military system.

MR. SATIN: That's right.

THE COURT: You want to offer a person that is going to say what? What issues are they going to attack?

MR. SATIN: For one thing --

THE COURT: Well, just tell me what issues they're going to attack. They're going to say people don't get their own lawyer.

MR. SATIN: Right.

THE COURT: What else are you going to say?

MR. SATIN: There's going to be discrimination between who is in which court system, whether they're in the military court system versus the civilian court system, how that decision is made.

THE COURT: Well, I think that touches on another issue we already said wasn't coming in this case. You're going to say that issue was made because they're Palestinians and not Israelis. That's irrelevant.

MR. SATIN: It's relevant because the reason for it -- the reason for it -- and this is coming from a judge in the Court of Appeals in that very military court system -- one of the reasons for it is because those defendants receive less due process than day do in Israel --

THE COURT: So? What do I care what the reason for it is? That's not at issue. I will look to see to what extent that you have direct evidence to present with regard to either these convictions or with regard to a systemic problem in the military system that you can document. To the extent that I see that you have such, I will consider whether or not that is appropriate for you to put into this case and to have the jury reflect on whether or not they should not accept these convictions. I'm not particularly compelled that you're going to be able to legitimately undermine the pleas of guilty or the convictions of these individuals who you don't necessarily take the position that really weren't personally involved. If you want to identify some convicted defendant that you claim was innocent, then I'm willing to hear it, but I don't think that is your argument. Your argument is not that you're identifying that X shouldn't have been convicted because he really never committed the offense, and that's why they shouldn't rule against the defendants, because this person who was convicted never did it in the first place.

MR. SATIN: I will say on that very point of whether

or not they did in light of the statements they made to the effect of I did do it, one of the things that is true about the military court system -- and we have evidence to substantiate this -- is that people say all kinds of things, exaggerating their guilt or even making claims of guilt when that's not the case.

THE COURT: That is not the military justice system's problem.

MR. SATIN: No, but --

THE COURT: People have their own incentives. That happens in the United States. People have their own incentives to confess to crimes they didn't commit. That's not a systemic issue with regard to the Israeli military court.

MR. SATIN: No doubt. I only say that because the Court was asking me, well, how can you bring out this evidence of the unreliability of the convictions in light of the fact that people have said they did it. So what I'm saying is there can be evidence based on the unreliability of the system and the convictions themselves that they didn't do it despite the fact that they may have said that they did. That's the significance of that.

THE COURT: I will look at it more carefully and see what it is, because I could not identify in my quick review what, as I say, documented evidence that you intended to offer other than somebody's opinion that they think that, in general,

most people don't get justice and some people maybe have coerced confessions and some people may plead guilty to things that they really didn't do. You should take all that amalgamation of stuff and decide, therefore, the people who were convicted in this case were wrongfully convicted. I'm not going to let you do that.

MR. SATIN: Let me back up for a second because I think that there has been a bit of a straw man that has been built here. I know Mr. Yalowitz started by stating they want to bring out all this evidence of torture, suggesting that we are doing something more than what we are doing. And I may have taken the bait a little bit when I shouldn't have. But one of the things that we are going to want to do -- and I suspect that they're going to do it on their direct first -- is to educate the people about the very system in which these convictions have happened, not even necessarily with the goal of showing that it is reliable or not, though I'm sure the parties will be doing that in some respects. One thing they're certainly going to want to do is at least give information because I suspect that these jurors, to the extent that they know anything about our own judicial system, probably know very little about the Israeli military court system. I certainly knew very little about --

THE COURT: I don't have any problems with that.

MR. SATIN: So one of the things that both sides, I

suspect, are going to be doing is going to be bringing out information about how it works, what actually happens there. And when that's done, I'm sure they're going to do it with an eyes towards: And this shows that there is a fairness to it. And we'll do it with an eye towards this shows that there is an unfairness to it. That's just the nature of the game. There is no reason that shouldn't happen if they're going to be allowed to present this evidence.

THE COURT: I think we addressed that part of it. I don't have any problems with, if they open the door to that, if they want to offer any further evidence other than this is how the process works and they want someone to comment or opine or provide evidence about the extent that due process is offered in these courts, then they will open the door, and I will allow you to put on whatever evidence you want to put on to counter that. But if that's not the way it comes out, I'm going to be very hesitant to simply your response to the fact that these people were convicted, to simply try to indict the entire system in order to convince the jury that these people really didn't do what they confessed to, that's why your guys shouldn't be held liable. I am not persuaded that you should have that kind of leeway if they don't open the door to some evaluation by the jury of whether or not this was a fair system or isn't a fair system that provides due process or doesn't provide due process. So I don't think the jury is going to be

particularly compelled one way or the other as to whether or not your clients were involved in terrorist acts by your clients now trying to prove something which you can't prove, is that the people who were convicted of perpetrating these acts really didn't do it and that's your defense. I'm sure that's not your defense. I'm sure you're not in the position to even attempt to say to the jury that you're in a position to know who perpetrated these acts and who didn't and to say that you know somebody else did it other than the people who pled guilty to it or were convicted of it.

MR. SATIN: Judge, it is not our burden to show who did it or didn't do it.

THE COURT: It is your burden if you're going to get up there and try to convince the jury that they shouldn't rely upon these convictions because the Israeli military system is so flawed that it is your position that you're trying to convince the jury that they shouldn't accept the convictions that these individuals, who are not even your individuals, didn't commit the crime. You're the one taking on the burden of trying to convince them that these are unreliable convictions --

MR. SATIN: Well, if I can --

THE COURT: The convictions are convictions. They are what they are --

MR. SATIN: If I can --

THE COURT: -- if you want to challenge them, then you've taken that burden on, not them.

MR. SATIN: Right. And if I said that I was mistaken, what I'm saying is that if they're going to present evidence that these people did it and the evidence for that proposition is these convictions in the military court, we can show, in challenging that evidence, that the jury cannot rely on those convictions.

THE COURT: To the effect that you're going to argue that the jury should believe they didn't do it?

MR. SATIN: The jury should not trust their claim that they did. That's the nature of the burden of evidence here.

THE COURT: As I said, be careful what you ask for. You may get it. Because I guarantee you, whether or not it is their burden or not, if you open that door, you're going to take on that burden before this jury. If they have not raised this issue, the jury is going to wonder why you're standing up there trying to convince them that people who you say you had nothing do to do with and you had no idea about their activities and are not here to argue today, mostly these people really weren't involved, that your attack on the judicial system isn't simply a red hearing and a distraction on what the genuine issue is, and the genuine issue is whether or not you participated with these or any other individuals to commit the crimes.

MR. SATIN: That is a strategic question, not an evidentiary question.

THE COURT: That is a strategic question.

MR. SATIN: We can choose or not choose to do that, and I realize that the judge is telling us -- and I'm not saying I agree or disagree at this point that it's a silly position for us to do that. I take the point that it may be silly for us to do that, but that is a separate question of whether we're entitled to do it under the law.

THE COURT: Go ahead.

MR. YALOWITZ: Okay. They are not entitled to stand around this courtroom and throw around -- I'm not -- there is not even a polite word for it -- some of the stuff that this guy is talking about, like it's an apartheid system or the judges view these defendants as an enemy -- I mean the depositions in this case were offensive to me and offensive to people, and I understand that the systemic issue goes to admissibility. And the Court has ruled on that. And you can't come before the jury and say there's a systemic problem with the Israeli military court system. That's the exact thing that we're talking about in our motion in limine, that the Israeli government mistreats Palestinian individuals. The Israeli government is not on trial here.

I hear Mr. Satin say, out of one side of his mouth, saying we're not going to attack the Israeli government, and

out of the other side of his mouth, he says stuff like there's a reason why they choose for the Palestinians go to the military system. There is a reason, which is there is a statute that says, if you commit a security crime against the state of Israel, that's where you're tried, and there is an agreement between the PLO and the government of Israel saying the military system that was in place before the agreement will continue. So yeah, there are reasons why they do it that way, but the reasons are not this sort of nefarious racial prejudice that is trying to be injected here. It really offends me. I really feel strongly about it.

THE COURT: My position so far is this, and depending on how the case unfolds, it may it may change: If you're not opening the door to that --

MR. SATIN: I'm not going to open the door.

THE COURT: -- then it's not likely that they're going to be able to just try to systemically challenge the system in order to somehow cast doubt on the conviction. If you open the door, what I'm more likely to allow is any relevant testimony that indicates that there is something problematic with the process and that that problem existed, there is evidence that problem existed in the particular case at issue. If that's something that you want to attack, if you want to say, look, they don't give people their separate lawyers and this guy who pled guilty didn't have a separate lawyer and the evidence was

used against him, maybe I will allow that. But to simply say, well, there's evidence that sometimes in Israeli investigations that confessions are coerced or beaten out of people, well, you can say that about any system. And to simply say that in general but to have no evidence that that played a part in any particular case that's before the jury to determine whether or not they should accept the conviction as an admission that the person did it or as a reliable conviction based on sufficient evidence under that system to convince the court that the person is guilty, no, I don't intend to allow a systematic attack on the military system. Even if they open the door, I intend to minimally allow it; and depending on how wide they open the door, I will reconsider it, but to allow any evidence that you might have that a particular case had a particular infirmity that you say the system has and cast doubt on that individual conviction, but no, you can't just say that the system is bad in general, so, therefore, most of these convictions aren't reliable in general, I'm not going to allow it.

MR. SATIN: I think it is more nuanced than that. It is really this is how the system works --

THE COURT: No --

MR. SATIN: -- this is how the system works --

THE COURT: -- that's how the system doesn't work. You can tell them how the system works.

MR. SATIN: We can tell them how it works, that's fine.

THE COURT: To the extent that the parties had an objective factual piece of evidence to offer about how the system works, not a biased argumentative factor about its fairness, you can offer that if you want to present evidence that everybody is entitled to a lawyer but not necessarily a separate lawyer, the jury can understand that. That's fine.

I assume you're not going to present evidence that under Israeli military court that a confession that is beaten out of a prisoner is legally admissible in a court of law. I assume that is not the evidence that you're going to present. So it has nothing to do with how the system is supposed to work. So if you say the system didn't work the way it was supposed to work in this particular incident, then you better have some evidence that in the particular case that you're trying to attack, it's reliability of the conviction, there is some evidence that it is semi-related to that case. That's my view of that. As I say, they open the door, I'm going to give you more leeway; if they don't open the door, it seems to me that unless you have some specific argument to make that a particular defendant's conviction should not be accepted because a particular thing happened in that case, I will consider that further if they don't open the door to this altogether.

The plaintiff also objected to any arguments that a verdict in plaintiffs' favor would interfere with United States foreign policy. You intend to argue that in this case?

MR. HILL: No, your Honor.

THE COURT: I think you also said you did not intend to argue any personal attacks on plaintiffs' co-counsel or their motives.

MR. HILL: Only to the extent that it would reveal the bias of the witnesses. Some of the witnesses are connected with the latest co-counsel. That's legitimate.

MR. YALOWITZ: No, it is totally illegitimate, and this is exactly what they do.

THE COURT: I'm not sure I understood what you just said. You intend to do what?

MR. HILL: One of the plaintiffs' witnesses is the accountant for the plaintiffs' lawyer in Israel.

THE COURT: You intend to attack that witness --

MR. HILL: With evidence of the bias.

THE COURT: Of whose bias?

MR. HILL: The witness' bias.

THE COURT: Okay. So what does that have to do with co-counsel?

MR. HILL: Co-counsel is the person who is his client in Israel.

THE COURT: You're not attacking his bias?

MR. HILL: The witness' bias because he is in a business relationship with the plaintiffs' lawyer.

THE COURT: You're not attacking the bias of the plaintiffs' lawyer?

MR. HILL: I don't believe so.

THE COURT: You're going to say to the accountant, isn't it true that you are in a business relationship with one of the lawyers in this case?

MR. HILL: Correct.

THE COURT: Okay. What bad are you going to say about the lawyer? Anything bad to say about the lawyer?

MR. HILL: I'm not sure I would in that particular instance, no.

MR. YALOWITZ: In any instance, your Honor.

THE COURT: I don't understand what you're objecting to that he just said.

MR. YALOWITZ: Here is what happens in the depositions: They go and they say, okay, Nitsana Darshan-Leitner, she's politically motivated, she does this and that.

THE COURT: Is that the lawyer?

MR. YALOWITZ: That's the lawyer.

THE COURT: That's not going to happen in this case.

MR. YALOWITZ: Right.

THE COURT: So that's the end of that part of it.

Anything else?

MR. YALOWITZ: No. I just --

THE COURT: It's not going to happen.

MR. YALOWITZ: Since they're doing it in the depositions, I want to make sure they are on fair warning, they're not going to do it in the courtroom.

THE COURT: It is very clear to me. If they want to attack the credibility of the witness who is testifying by indicating that that witness has some bias or affinity with one side or the other, they have a perfect opportunity to do that, but they are not, nor have they indicated to me that they would attempt to cast aspersions on any lawyer who participated in this case because that wouldn't have any relevance to the jury's determination of the issues in this case. I want to make that clear.

You've got to give me a better idea of who you think that you're calling as a witness and what they are going to testify to if they're objecting because they said they had knowledge.

MR. HILL: You want me to give it to you in writing?

THE COURT: It would be helpful to just give me the list of those witnesses that you intend to call --

MR. HILL: Description of what their testimony might be?

THE COURT: Yes, what the subject of their testimony

might be. I'm not quite sure I understand the nature of the disagreement as to whether or not they were properly noticed that these witnesses might testify --

MR. HILL: I would be glad to do that.

MR. YALOWITZ: Your Honor, the nature --

THE COURT: -- or if you have some other argument to make that they have nothing to complain about, they should have properly known and are always on notice that these were potential witnesses, then I will consider it further, and I will consider what particular objection I have, but I don't have enough information about these witnesses.

MR. YALOWITZ: Just to be crystal clear, your Honor, the nature of my problem is that we are 27 days before trial, and I have never heard from the defendants, despite my asking them, who are these people and why are you going to call them. As soon as I saw them on the witness list, I was like --

THE COURT: You don't know who these people are?

MR. YALOWITZ: -- I never got a disclosure about them. Some of them I can figure who they are, Salam Fayyad, he was the prime minister, I know who he is. So if he comes, fine, you know, I have no problem with him coming, I'll cross-examine him, whatever. Some of these people are obscure. I have no idea who they are, what they are, why they think they're going to bring them as witnesses.

THE COURT: We're going to get that.

MR. YALOWITZ: I need to know that. If they're important and the Court is going to indulge them in bringing with witnesses that were never disclosed to me who they are or why they're bringing them, I need a crack at them. Not seven hours, but I need some crack at them.

THE COURT: Well, I thought we had already earlier agreed that you two were also going to exchange exhibit lists and witness lists, and do it simultaneously, and pick a time to do that. My suggestion is that you do that before January 5th. Okay? Simultaneously. But I want this other letter, I want it within the next ten days, telling me who these witnesses are that you guys are fighting about and what you anticipate they're going to say. You may get that list and decide there's only a handful of those people that you really have some objection to, and then you can articulate the specific objection, but I can't rule on the objection as a group because I don't have any idea who these witnesses are. They say that you know; you say you don't know. Let's see who they are, what they're going to testify to.

MR. YALOWITZ: Would it be possible to ask the defendants to provide the list by Friday, your Honor, since they are their people and their employees, they control them?

THE COURT: What's reasonable for you?

MR. HILL: I was going to say Tuesday.

MR. YALOWITZ: We'll settle on Sunday then?

I mean, really, we're so close to trial, and they're screwing around. They know exactly who these people are. They're playing games with me.

MR. HILL: Frankly, your Honor, I'm in the same boat with some of their witnesses. There are a number of people on their list that I don't know who they are.

THE COURT: Make sure he has it no later than Tuesday.

MR. HILL: Yes, your Honor.

THE COURT: I don't see any relevant admissible evidence by experts on damages in other cases. This case is not other cases. I'm not sure what you would be comparing this case to if you wanted to offer some expert. Obviously, it would not be an appropriate analysis to show what people get in a car accident and try to tell the jury that has some relevance as to how they're supposed to assess damages in this case. Unless you can convince me that somehow --

MR. HILL: Some of the damages measures that we proposed are other jury verdicts for similar injuries.

THE COURT: What's similar to a terrorist attack in Jerusalem?

MR. HILL: Similar types of injuries. So if it is someone who died --

THE COURT: Well, that's what I said. If I get run over by a car in New Jersey and I get a judgment, that's not an appropriate way --

MR. HILL: These are not auto accidents. These are our cases involving intentional use of force by police officers. So they are what our experts determined would be most analogous jury verdicts.

THE COURT: I don't see that that is admissible in this case.

MR. HILL: Beyond the jury verdict analysis, another analysis is what people were compensated for, for the injuries they sustained from the terror attacks on 9/11. So these are direct, reasonable measurements of compensation.

THE COURT: I don't know why that is admissible for this case. Jurors make their own determinations of what things are worth, and you make your own arguments about what things are worth. It is not a legitimate basis for a jury to give a verdict simply because another verdict was given in another case. That has a different set of facts, has a different scenario. It is not likely that I'm going to allow that unless you want to submit something further to show me why that would be admissible and that would be a legitimate basis for the jury to determine the amount of damages in this case.

MR. HILL: We can submit a letter. We think it is a reasonable measure of reasonable damages.

THE COURT: I'm not aware that that has ever been admitted in a case.

MR. YALOWITZ: They already briefed this. They don't

need other letters.

THE COURT: If you have something else different to say, fine; otherwise, I will just go back to your papers.

I thought, in my 25 years as a judge, I had heard everything, but this is the first time I've heard that there was an expert whose expertise is to testify about other experts not being experts. I have never heard of that. Where do you get such a guy?

MR. HILL: From the University of Bath.

MR. HORTON: They couldn't find one in America, is the answer, your Honor.

THE COURT: There is no such animal. He doesn't even have the same expertise as any of the experts that you want him to opine on that they're quack experts. I looked at that. If you have something else to say, that's fine, but it is not likely that you're going to get a guy that will simply get up and say, I don't know this guy's area of the law but I don't think he is a qualified expert because I know about experts and I'm an expert on experts.

MR. HILL: The nature of the testimony would be that they're not engaging in a reliable methodology, which he does have expertise on.

THE COURT: Unless he is engaged in the same area of expertise, that testimony is not admissible.

MR. HILL: He is engaged in the study of terrorism and

terrorism experts.

THE COURT: If you want dueling experts, that's fine. But if you want an expert just simply to say that I'm opining about the other experts because I say that they're not qualified as experts in whatever field they're in, that's not fine. If you have designated a counter expert and that counter expert is giving expert opinion on the same subject matter as the expert that he's attacking, then that's your dueling expert, and that's your counter expert. You don't get an expert on being an expert. The way you've described this person and his qualifications, no, his testimony is not going to be admissible.

This was the Plaintiffs' argument, but I'm not sure that the defense would argue that they have such a person. I'm not even sure, given my rulings, that this would even be an issue for anybody, but an expert on the law, is there any reason to have an expert on any area of the law?

MR. HILL: No, nobody would be testifying about the law, but expert opinions that we have disclosed are relevant and respond to the plaintiffs' experts in the case.

THE COURT: Right. They said that you have some kind of law expert --

MR. HILL: No. The only person that would have testified about the law would have been on foreign law claims, and those have been --

THE COURT: That's what I thought.

MR. YALOWITZ: Actually, I thought they had a couple of lawyers. They had this lady Sharon Weil. She is a very nice lady. She testifies about international law and whether the military court system in Israel satisfies international law. I don't know if they're planning to bring her. There was one guy, Raja Shehadeh, for example, testifies that the occupation violates international law. He shouldn't be a witness.

THE COURT: We have already dealt with that in other areas. This is not the issue in this case.

MR. YALOWITZ: Muhammad Dahleh has opinions about Israeli law, and that's out of the case.

THE COURT: We're not going to have that.

Quickly, I have to go back to defendants' motions because I have to look at it in more detail. Do you intend to call Mr. Marcus?

MR. YALOWITZ: Yes.

THE COURT: What is Marcus going to testify?

MR. YALOWITZ: What Marcus is going to do is he's going to bring videotape and newspaper articles from the defendants' own media that they own. He's going to say, hey, look, these are their words, and their media says, kill Jews and do bad stuff. It is evidence.

THE COURT: Evidence of what?

MR. YALOWITZ: It is evidence both that what their messaging is to their own people --

THE COURT: How does that advance, make it more likely that they were involved in these terrorist --

MR. YALOWITZ: Because it shows that they in advance and after the fact are telling people that it's okay to commit terror.

THE COURT: You think that meets your responsibility under the ATA to make them liable if somebody goes out and commits a terrorist act?

MR. YALOWITZ: Their defense is, we are against terror, we condemn terror, and we did everything we could to block terror. That's their defense. And so their own words put the lie to that defense because their own government-controlled media outlets didn't say stop the terror. They said, you people have a right to jihad or that a million martyrs should march to Jerusalem, or this terrorist did a great thing and more people should do things like that.

So he's a very important witness to meet their --

THE COURT: He may be an important witness, but it is not likely I'm going to let him testify. I will look at it more carefully; but one, I have a problem with your using the newspaper articles and simply, by saying they controlled the newspapers --

MR. YALOWITZ: No, no, it is not controlled.

THE COURT: To use statements by a reporter in a newspaper and simply by trying to say that they controlled the media --

MR. YALOWITZ: That's not my -- no, I'm not bringing that up.

THE COURT: -- that's not sufficient to attribute those individual statements to the PA or the PLO.

Second of all, even if that were the case, there is very minimal, if at all, any probative value as to the rhetoric. As I say, the jury is not going to be surprised of the heightened rhetoric going back and forth between the parties, and that heightened rhetoric does not make it more or less likely that the defendants were involved in any of the particular acts that were committed here. If you have some individual statements about those particular acts that you think that you can tie those statements to appropriate representatives, responsible representatives of the PA or the PLO, if the president of the PA was quoted saying something about that act before or after it took place and you want to consider offering something like that, I will consider that. But just in general to say, we got a bunch of newspaper articles where they say, we hate Israel, wipe them off the map, and then you say that that's relevant evidence to prove that they committed these terrorist acts, no.

MR. YALOWITZ: Let me try to be a little clearer about

this because it is not control like censorship.

THE COURT: I understand your point. They own it, they don't let anybody say anything they don't want them to say.

MR. YALOWITZ: They own it. Everybody who works there is on their payroll. They appoint the top dog, so it is their mouthpiece.

THE COURT: Okay.

MR. YALOWITZ: And when their mouthpiece wants to tamp down violence, the mouthpiece says stop; and when their mouthpiece wants people to be violent, they say, go do jihad.

THE COURT: That doesn't prove this case.

MR. YALOWITZ: Well, it does go, in my opinion, your Honor -- and I know you'll think about it -- it goes very, very much to state of mind.

THE COURT: I know what the state of mind is on that issue. Your position is that they want the destruction of Israel. I know what you say their state of mind is, but that has --

MR. YALOWITZ: I think --

THE COURT: -- nothing to do with the jury determining, even if they accepted that proposition, that doesn't move them any closer as to whether they are responsible for the terrorist acts that are at issue here.

MR. YALOWITZ: It also goes to scope of employment

because, look, they're going to stand here in four weeks at opening statement and they're going to say these individuals went rogue. That's going to be their case. They went rogue. And if I'm going to meet that, key evidence for me is their own words in which they say to their population -- and we also have evidence of like their Stars and Stripes Magazine, you know, for the military, saying go kill Jews. But even what Marcus brings, which is more general stuff, is not the message of somebody who says don't do violence, and if you do, you're going rogue. The message that they're giving is it's good to go be violent. That's the message that the government, which is on trial, is giving. And then people go, and they do it.

THE COURT: I know, but I'm not going to accept that connection, that kind of proof. You can't simply say that they are responsible for every terrorist act that takes place because they, in their newspaper, said, people, if you want to, go out and do terrorist acts.

MR. YALOWITZ: Maybe we have got to save him as a rebuttal witness. Maybe we ought to save them as a rebuttal evidence, but if they open the door --

THE COURT: It is not direct proof of their involvement in any of these acts.

MR. YALOWITZ: I agree with that.

THE COURT: If you have --

MR. YALOWITZ: It doesn't go to causation. What I'm

saying is, if they stand around and say, oh, we were trying to tamp down the violence, we were trying to stop it, and we just --

THE COURT: As soon as they open that door, you may have some admissible evidence if you can demonstrate that this is an official statement by the PA.

MR. YALOWITZ: Right.

THE COURT: Then you may be able to rebut it with such statements, if they say that. They may say that. They have evidence that people were arrested for doing terrorist acts, people were detained, they cooperated with some Israeli authorities in investigating some of these crimes. So where you guys go with that is a different question. But just in general, to be able to, in your case in chief, offer evidence that they have heightened rhetoric against Israel --

MR. YALOWITZ: No, no, that's not --

THE COURT: -- and you want to put that in because that advances your argument that they must be complicit in these acts, I'm probably --

MR. YALOWITZ: No, no, that's not where I want to go with that. Maybe we ought to revisit the question of Marcus after we see the opening statements.

THE COURT: That's fine. That's my reaction at this point. I can give you a ruling at the appropriate time.

Let me quickly run through this so we can let the

court reporter go.

MR. HORTON: I just want to add one brief point on this. Obviously, your Honor will make your own decisions. But there is an analogue to Mr. Marcus involving cases against Al-Qaeda. The same sort of claims that they have brought against Mr. Marcus here have been tried against Mr. Coleman, is his name. In case after case, the courts have consistently said, he is an expert, his methodology is appropriate, this is appropriate testimony, that's other courts in this district, other courts around the country. We're not writing on a blank slate here. Those cases are all discussed in our brief. I would ask your Honor to --

THE COURT: I will look at that. I think you have several hurdles, as I said. One, you have to convince me that they are responsible for every single statement that is made in the newspaper that they control; and two, that the interpretation of that statement, that the jury can conclude that this is a signal to go out and commit the act that you're accusing them of committing. Those are big leaps, and I understand the inference you want, but I think that those --

MR. YALOWITZ: I think we need to see what their position is, because if they're not going to contest this, okay, then we can evaluate it. Like I said, you know, I don't mind waiting and bringing him as a rebuttal witness. It is not a methodology issue.

What I understand your Honor's concern to me is: What element of the claim does it go to?

THE COURT: Okay.

MR. YALOWITZ: Let's see what they do on opening.

THE COURT: Addicott, I'm not quite sure I understand his testimony or the nature of the objection. He wants to testify that Fatah and the PA are basically indistinguishable?

MR. YALOWITZ: We don't need Addicott.

THE COURT: What about Karsh?

MR. YALOWITZ: We're fine without Karsh.

See, I tell you when I need somebody.

THE COURT: As they say, the most effective advocacy is to be consistently reasonable, and you can convince me of something.

MR. YALOWITZ: Always appear reasonable.

THE COURT: Eviatar.

MR. YALOWITZ: Eviatar is a key witness.

THE COURT: You want him to testify in general that the PA and the PLO engages in terrorism?

MR. YALOWITZ: No.

THE COURT: I'm not sure I understand the nature of his expert --

MR. YALOWITZ: Eviatar is a former field intelligence officer. He spent his entire career in the West Bank and Gaza Strip. He knows these people very well. He's a fluent Arabic

speaker. He has personal relationships with a lot of these people. The first thing he has got to do is he's got to educate the jury, who is the PA, who is the PLO.

THE COURT: What is he going to say about them that is going to advance this case?

MR. YALOWITZ: He is going to say the PLO is this entity and what they are and what their charter says and like that.

THE COURT: I don't think anybody has any problem with that.

MR. YALOWITZ: Then, he is going to say --

THE COURT: What's the bad stuff he's going to say?

MR. YALOWITZ: Well, then, he's going to say, okay, here's what the PA is. They were created by the PLO, and they report to the PLO, and they're an agent of the PLO. He is going to talk about the relationship between the two of them, agency, alter ego, like that.

THE COURT: All right.

MR. YALOWITZ: He's going to talk about Fatah, which we heard about Fatah, the Republican party, and he is going to talk about Al-Aqsa Martyrs Brigades.

THE COURT: He is going to define, from your perspective, what Fatah is and what the Brigade is?

MR. YALOWITZ: Yes.

THE COURT: What is it that they're concerned about in

terms of your painting them as terrorists?

MR. YALOWITZ: Then, he is going to talk about the engagement of Arafat and his senior staff in material support of terrorists. So he's going to bring evidence of --

THE COURT: What evidence is that going to be other than his opinion?

MR. YALOWITZ: Convictions.

THE COURT: Not convictions of Arafat?

MR. YALOWITZ: No, no, but convictions, admissions, videotape --

THE COURT: Tell me what the purpose of this testimony is. To show that they are independently terrorists unrelated to these acts?

MR. YALOWITZ: To show that they provided material support to terror organizations, Al-Aqsa Martyrs Brigades and Hamas.

THE COURT: Do you have direct evidence of that, or is that just his conclusion based on his review of other sources?

MR. YALOWITZ: It is his opinion based on his review of admissible evidence.

THE COURT: I'm not going to let him give me that opinion. He's going to have to give me that fact.

MR. YALOWITZ: Yeah, right.

THE COURT: If you having a specific instance of a fact that ties them to a terrorist act and you can convince me

that that is relevant, then I will consider that.

MR. YALOWITZ: Right.

THE COURT: No, we don't need an expert to come in and opine that he believes that the PA and PLO are terrorists --

MR. YALOWITZ: That's not --

THE COURT: -- based on his analysis of the totality of the circumstances --

MR. YALOWITZ: You have to give me some credit here. I have been doing this for 25 years. That is not what Eviatar is going to come in and do.

THE COURT: You have got to give me a better idea of specifically what is you want him to say that they cannot object to.

MR. YALOWITZ: Okay. For example, he's going to talk about material support of Hamas. He is going to talk about the connection between the PA, PLO.

THE COURT: What is he going to say?

MR. YALOWITZ: He is going to say --

THE COURT: That they give money to Hamas?

MR. YALOWITZ: They didn't give money to Hamas.

THE COURT: Okay. Give me more specifics.

MR. YALOWITZ: They gave weapons, they gave bombs, they gave bomb-making equipment, and they --

THE COURT: How does he know this?

MR. YALOWITZ: He knows it from the guy's confessions,

he knows it from the convictions, he knows it from the guy's admissions on videotape.

THE COURT: Why isn't that all hearsay?

MR. YALOWITZ: Why are convictions and confessions hearsay? We just went through that.

THE COURT: Not convictions. You said he was going to give his opinion that based upon information that he knows that they supplied bombs and stuff. You are going to have convictions of PA officials that you're going to offer in evidence?

MR. YALOWITZ: One, yeah. Yeah. There is one PA official who was convicted of material support --

THE COURT: Okay.

MR. YALOWITZ: -- of Hamas for the Hebrew University bombing.

THE COURT: Okay.

MR. YALOWITZ: Then, he has a lot of granular information.

THE COURT: We have that fact.

MR. YALOWITZ: Because the jury -- it is so alien.

THE COURT: It's not that sophisticated when you come right down to it. Everybody knows what a bomb is.

MR. YALOWITZ: I know, but the whole milieu is so alien. If you don't give the jury some background of somebody who reads the language, who speaks the language, who

understands.

THE COURT: This is my problem. You can understand my problem. I'm hesitant to have someone walk in here, say I'm an expert, and testimony they want to present to the jury is, in my expert opinion, the defendants are terrorists. Okay?

MR. YALOWITZ: I understand.

THE COURT: You can understand my concern about that. That is what this sounds like.

MR. YALOWITZ: It is not.

THE COURT: I will look at it more thoroughly, and I will look at the nature of their objection, but I'm not convinced by this dialogue that he has direct evidence to give, relevant evidence that you want him to give, other than his opinion they're a bunch of terrorists.

MR. YALOWITZ: No, no, no. He is not going to give his opinion, oh, I know them, they're a bunch of terrorists. He may believe that, but that's not expert testimony. He is going to give very granular, very backed-up -- these are intelligence guys. That's their job, is to look at what is the data that I have, what are the documents that I have, analyze the documents, understand them in the language in which they were written.

So I'll give you an example. I will give you a great example. There are documents that were seized from the Palestinian Authority's headquarters, in which Arafat is

signing, give this amount of money to this guy and that guy and that guy. It is Arafat's signature. He knows Arafat's signature. We have other people who admit it is Arafat's signature. It is not going to be an issue. Then, we have other documents also from the PA that are like intelligence reports from this General Intelligence Service that say, here's a picture of what Al-Aqsa Martyrs Brigades is doing in this particular region. They give very detailed information. What do you know? It's the same guys. So he's able to look at the documents --

THE COURT: So is the jury.

MR. YALOWITZ: Yeah, yeah, but --

THE COURT: That's what I'm trying to figure out. Are you going to offer that in evidence, or are you going to just offer his opinion?

MR. YALOWITZ: I'm going to use him to present the evidence and help the jury understand what it means in the context of a milieu that is very unfamiliar.

THE COURT: Well, let me look at that more carefully.

Does the defense want to say anything further at this point?

MR. HILL: I don't think the documents Mr. Yalowitz just referred to have anything to do with the seven incidents that we're going to try in this case. The people involved in those documents, as I recall them, they're not the perpetrators

of this case. I don't think this man has anything relevant to say. We deposed him at length about his personal knowledge. He disclaimed any personal knowledge. He disclaimed any reliance on his experience while he was working for the IDF. I think he is best viewed as someone who is going to summarize hearsay. If he has any use at all, your Honor is going to have to rule on whether or not he is going to do something other than just summarize hearsay or give his general opinion about the PA.

THE COURT: I assume that if he's qualified to give opinions about the structure of the PA and the PLO --

MR. HILL: I'm not even sure he is qualified to do that. Frankly, I'm not sure that it's in his report. We have to go back and look at it. That was not the focus of his report.

MR. YALOWITZ: It's in his report.

THE COURT: Do I have this report? Is that attached --

MR. YALOWITZ: I know you have a lot of paper.

MR. HILL: It is attached to the motion in limine.

THE COURT: We talked about Kaufman.

MR. YALOWITZ: So Shrenzel.

THE COURT: Shrenzel.

MR. YALOWITZ: Shrenzel is a very important witness, too. He is a retired intelligence officer from the Shin Bet.

What he does is he looks at the convictions, he looks at the payroll records, he looks at the messaging from the PA to the police department. He gathers all kinds of information about the particular attacks, which is what Eviatar is doing for the Hebrew University attack, but he does the other six, and he says, here is a picture of the direct involvement of the defendants in this attack, and here is a picture of their material support for the people --

THE COURT: Tell me what form that testimony is in. Is that some kind of a chart?

MR. YALOWITZ: It is a metaphor.

THE COURT: I know, but what is he going to say about them? You want him to analyze each incident and say that it is his opinion that this evidence evaluated leads to the reasonable conclusion that they were involved.

MR. YALOWITZ: Right.

THE COURT: Why is that the jury's province?

MR. YALOWITZ: It is the jury's province to make the ultimate conclusion.

THE COURT: That's what you want him to make.

MR. YALOWITZ: No, I want him to bring the evidence to the jury from which they can make the ultimate decision.

THE COURT: I'm not as concerned about what evidence you want him to talk about that's presented to the jury. I'm more concerned about what expert opinion that you want him to

render. You want him to render that, in his expert opinion, they were involved in these attacks? That's basically his expertise? If the jury needs him for --

MR. YALOWITZ: No, his expertise is understanding the documents.

THE COURT: But his expert opinion, what is his expert opinion?

MR. YALOWITZ: His opinion is that the documents support the conclusion --

THE COURT: That they committed --

MR. YALOWITZ: That the PA itself, through its employees, was directly involved. And so he can bring evidence dealing with the various factors that the courts have looked at or that the jury is going to have to look at with regard to the scope of employment.

THE COURT: What is the nature of his expertise that the jury needs his opinion to render on what they have to decide?

MR. YALOWITZ: He reads, speaks, and writes Arabic, and he spent a career studying the Palestinian arena.

THE COURT: He is a really smart guy, but that doesn't tell me about why his opinion is any more valid than anybody else's opinion given an informed jury that's supposed to make this decision solely on the evidence presented at this trial.

MR. YALOWITZ: Look, I'm being very candid with you.

THE COURT: No, I understand that.

MR. YALOWITZ: I don't see how the jury understands this evidence, which is --

THE COURT: Why?

MR. YALOWITZ: Look, I have been through it. I have been studying it --

THE COURT: I know, but, look, the evidence is not as complex as you guys want to make it out to be. It is not that complicated a case. Either you're going to be able to tie them to these incidents or you're not; and if the jury finds that there is evidence that a reasonable jury can conclude that they were participants in these terrorist acts or that the people who they employed knew that they had the permission and encouragement of the employer during the course of their employ to do these acts, or they had some direct participation, they're going to find them liable. As you say, each one of the acts is very straightforward, not complicated.

MR. YALOWITZ: Right.

THE COURT: You have somebody coming in and shooting somebody or blowing somebody up.

MR. YALOWITZ: Right.

THE COURT: It is a who-done-it, not what happened.

MR. YALOWITZ: So he will give a summary of, for example, each of the perpetrators --

THE COURT: Right.

MR. YALOWITZ: -- and what is their relationship to the PA.

THE COURT: That's fine. I don't have any problems with that. He can summarize the evidence if he wants to make such a chart.

MR. YALOWITZ: He will give examples of their police magazine saying to the police -- like they have these -- we don't have anything like it. It is like a political guidance directive. He will give examples of the police magazines that are distributed to the police force saying, kill Jews.

THE COURT: If that turns out to be admissible, he can organize that for the jury, too, and say this is what you have --

MR. YALOWITZ: Right.

THE COURT: -- make your decision.

MR. YALOWITZ: Right.

THE COURT: But where does it come in that he gets to be an expert to say, well, my opinion is that the PA and the PLO were involved in this based on my review of the evidence, that you review it, and you should take my word for it?

MR. YALOWITZ: So you just don't want him to opine on the ultimate conclusion?

THE COURT: That's the first thing I don't want. I mean, I don't see what basis he has expertise to of offer when he says, this is the evidence that you had. I'm laying it out

in an organized fashion. The lawyers will argue what they want to argue as to what you should do with that, but I'm going to tell you this is what you have, you have these people doing this, you have this relationship, you have them saying these things, and this is the evidence that the plaintiffs have put together in support of their case that these people are responsible.

MR. YALOWITZ: Are responsible, right.

THE COURT: It is your argument to make that based on that evidence that the jury should conclude that. No expert has any greater ability to conclude that than the jury.

MR. YALOWITZ: Look, I didn't think it was forbidden. Let me go back and think about it a little bit, and I know you will, too. But I didn't think it was forbidden for an expert to offer opinions on the ultimate issue. I think that dueling experts do that all the time. If they want to bring in an intelligence agent that says, look, I have looked at this picture and here are all the reasons why the PA is not responsible or the PA is not connected with these particular --

THE COURT: It is a more basic problem than that. You have to convince me that he has some area of expertise that makes his conclusion evaluating this evidence somehow more valid or necessary or helpful for the jury to make that conclusion on their own. They don't need him for that. Why do they need him for that?

MR. YALOWITZ: Because he has a career of studying and understanding their system.

THE COURT: This is not a system issue.

MR. YALOWITZ: It kind of is.

THE COURT: It's a they-did-it-or-they-didn't-do-it issue.

MR. YALOWITZ: Yeah, but part of it is --

THE COURT: I don't want the jury to have to conclude based on, well, this is what I know in my experience that goes on over there, so therefore, it is my conclusion that these people were probably involved in this. That's not an area of expertise that's appropriate for the jury to be able to use that to base their judgment on that somehow they think he's smarter than them and he has some greater experience to be able to conclude that they must have done this.

MR. YALOWITZ: Look, the only thing that -- the only sticking point that I'm seeing with Shrenzel -- I want to come back to Eviatar for a minute because there is another thing I want to talk about -- but with Shrenzel, the only sticking point that I'm seeing between what you're saying and what I'm thinking is I think he's entitled, after he gives all of the evidence of, for example, the perpetrators of this particular incident, what they were convicted of, what their relationship is with the PA, I think he is then entitled to say, in my opinion, this is evidence of their involvement in terror

because that's been his job or that was his job for years and years, was to prevent terror.

THE COURT: But that opinion isn't the relevant opinion, even if it was admissible, and I think the relevant opinion, which even though it is relevant is not admissible is that he would have to say: This is the evidence that you heard. It is my opinion that you should find against them based on this evidence. No, they don't need him for that. That's not appropriate for him to opine that. He can give his opinion --

MR. YALOWITZ: No, I don't think that's what he is saying --

THE COURT: -- about the weight of the evidence. That's what you're saying. If he is basing this on something that is not before the jury, it is improper for him to be here in the first place. I'm assuming that all he is saying to the jury is this is the evidence that you heard, it is my opinion that you should find against them based on this evidence. The jury does not need him for that purpose no matter how smart he is.

MR. YALOWITZ: He is very smart.

I think there are things that an expert is entitled to do that a summary witness can't do that he should be allowed to do. So, for example, an expert can say, look, the defendants had a number of policies that supported terror and that makes

it more likely that they supported terror in this instance. For example, they put convicted terrorists on their payroll even if they weren't already their employees. For example, they have a law that says, if you're convicted of terrorism and you're already on the payroll, you stay on the payroll.

THE COURT: How is that more compelling coming from him than coming from you in closing argument? Because he is a smart guy?

MR. YALOWITZ: No, because he lived through it.

THE COURT: I know. You think that makes him more qualified to evaluate that evidence than you?

MR. YALOWITZ: Than me, yeah, of course.

THE COURT: Than the jury?

MR. YALOWITZ: Of course.

THE COURT: What part of that that you just said makes it so sophisticated that I need an expert to tell me that?

MR. YALOWITZ: Because we hear the defendants back here saying, oh, we have laws that say GIS can't do this, that, and the other. Well, you have to understand what are the laws and what was the real relationship that Arafat had to his senior staff.

THE COURT: If he has some knowledge about that and he wants to testify as to the relationships or some factual information that he has or he knows the nature of the relationships, that's fine.

MR. YALOWITZ: Right.

THE COURT: The problem is I don't see this guy is much use to you unless you can get him to say, it is my opinion you should find against these people based on this evidence, and I'm not sure I'm going to allow him to say that. I'm not sure that that his province to say that.

MR. YALOWITZ: I think an expert is allowed to opine on the ultimate issue in the case.

THE COURT: He is not opining on the ultimate issue in the case. He is telling the evidence that they hear is sufficient evidence for them to find liability. That is not within his province.

MR. YALOWITZ: I think intelligence agents have an important role in a case where the defendant here is a police operation and the police department runs in a certain way and they know how that department runs --

THE COURT: They can explain that.

MR. YALOWITZ: They can explain that.

THE COURT: They can explain that, but the rest is common sense.

MR. YALOWITZ: Okay.

THE COURT: You think it takes an expert for you to make the inference that if somebody is committing terrorist acts that you want to argue to the jury that they should infer from that that they approved of those terrorist acts because

they didn't fire him? You think you need an expert to make that argument? I don't think the expert has any greater opinion on that issue than you or I.

MR. YALOWITZ: I think the jury will get that. The jury doesn't know who Muhammad Dahleh is and what's his role. And when the defendants come and say --

THE COURT: If there's factual testimony that someone can give us for who he is or what his role is, that's appropriate.

MR. YALOWITZ: Right.

THE COURT: But to say, and also, by the way, I think that based on that his role is terrorist --

MR. YALOWITZ: I think we're going to have to take this question by question. I'm not saying that I'm never going to ask a question that, you know, you don't sustain an objection to. I will try not to.

THE COURT: Try to avoid as many objectionable questions beforehand --

MR. YALOWITZ: Me, too. It is not good for me.

But the idea that these guys are not experts or something, you'll meet them. You'll see that --

THE COURT: I have very little concern about his expertise or about the testimony that he might want to give about how he explains his experience, what the relationships are between the entities if that's what he is going to testify

to. If they want to dispute that, they can say, no, he is wrong about that. He thinks they have a relationship and they don't have that relationship, or he thinks that they control the GIS but they really don't, GIS does whatever they want to do. Whatever guys you want to debate about, that's a different issue. When it comes down to whether or not he is qualified to tell us who is a terrorist in this room, I'm not so convinced.

MR. YALOWITZ: All right. Did you want to add --

MR. SATIN: Yeah, I will be very direct.

I will direct the Court to page 3 of the expert report of Israel Shrenzel, under the section of expert opinion. This is the very first sentence in the substantive portion of his report. "I have been requested by counsel for the plaintiffs to provide my expert opinion with respect to the degree of involvement of the Palestinian Authority in six terrorist attacks that are at the center of this action."

Then, what he does in his report, he reviews the discovery in this case, which may or may not be admissible, and he renders his opinion they did. In other words, it's like a detective looking at the evidence in this case and saying, the guy is guilty. That's what his report says. That's what Mr. Yalowitz wants to use him to do.

Now, when the Court told Mr. Yalowitz a moment ago that that's not permissible, he then stated, no, he's going to talk about how police operations work, Muhammad Dahleh, police

magazines. None of that is in his report.

MR. YALOWITZ: That's not true.

THE COURT: I don't need to debate that issue, but I will review that in that context.

Any last thing?

MR. YALOWITZ: No. No. I think we've done a lot today.

THE COURT: All right. So what I'm going to do --

MR. HILL: Your Honor, you haven't mentioned anything about their other expert, Matthew Levitt.

THE COURT: Yes, I did have some. I'm sorry.

Levitt was going to testify about the relationship between the AAMB and Fatah?

MR. HORTON: Your Honor, I think that's exactly the sort of thing you just said Mr. Shrenzel could testify about, who these people were and how they worked.

THE COURT: What is he going to base his knowledge upon.

MR. HILL: He appears to base it on newspaper articles and internet research.

MR. HORTON: He testified, quite clearly, it was based on extensive field research in the area at the time.

THE COURT: What is in dispute? Whether or not --

MR. HILL: When I deposed him, he said he couldn't recall talking to anybody about the subject matter.

THE COURT: Are there going to be instances of evidence of the PA funding the AAMB?

MR. HORTON: Yes.

THE COURT: What is the nature of that direct evidence in this case?

MR. HORTON: He is going to testify based on his experience. I said there was field work. Mr. Hill said he couldn't remember specific names ten years after the fact.

THE COURT: What is the evidence that the PA funded the AAMB?

MR. HORTON: He has an extensively documented report with a lot of documents to back up all of this.

THE COURT: What does it say?

MR. HORTON: I don't have them with me right now, your Honor. I can't be more specific.

THE COURT: What about the relationship between the AAMB and Fatah? Is there some disputes about that?

MR. HILL: Yes, your Honor.

MR. HORTON: This is a hotly disputed issue. This is the question of whether they are the military wing of Fatah. He has studied them carefully. He cited to a lot of materials. Some of them may be admissible. Some are the sorts of things on which experts reasonably rely --

THE COURT: If you can show me some admissible evidence that demonstrates the PA funded the AAMB, I will allow

it, and I will allow him to testify about that.

MR. HORTON: It is not just that, your Honor. As an expert, he is allowed to testify based on inadmissible evidence on which experts --

THE COURT: No, he can't testify to a fact. Whether the PA funded the AAMB is a fact. If he --

MR. HORTON: I understand --

THE COURT: If he has evidence of that fact and can tell the jury what it is and the jury can conclude based on that fact that that evidence of that fact is true or he doesn't. He can't simply say it is my opinion that they funded that.

MR. HORTON: I understand the distinction you're drawing.

THE COURT: If you can direct my attention to the evidence that you can put before the jury that indicates the PA funded the AAMB or evidence that you can put before the jury that there is a relationship between the AAMB and Fatah, then I will allow that evidence in, and I will allow some expert testimony from him based on that evidence. I'm not going to allow him to walk in and say I'm a smart guy and it is my opinion based on the newspaper articles that I read that the PA funds the AAMB or that AAMB and Fatah have a close relationship. If there is no evidence to on which you, I, or the jury can make that conclusion, then I'm not going to let

him simply testify to that conclusion based on newspaper articles that he has read. He has to say he looked at some facts, tell us what those facts are, give us some specific incidents where he says it was established that this money was traced from the PA to the AAMB. An opinion that it happened is not admissible in this case.

MR. YALOWITZ: Can I just leave you with one thought?

THE COURT: Yes.

MR. YALOWITZ: Which is, in the Arab Bank case that Judge Cogan just tried, I think Levitt testified, if I'm remembering correctly. I think that the guy who had Eviatar's job in the military intelligence before Eviatar did testified in front of Judge Cogan, and a former Shin Bet intelligence agent like Shrenzel testified. My memory is we briefed all this stuff before Judge Cogan issued rulings allowing those witnesses to testify.

One of the things I want to do is go back and look at what he said. Those guys all testified, and they came in -- I'm not saying that every single word that they might have wanted to say they said. I'm sure that there are constraints and your Honor is going to try a different case than Judge Cogan. I'm not saying that just because he did it that you're going to do it. I just want to look at what he did because I think that, focusing on the really impactful witnesses here, these guys, to get a New York jury up to speed on what these

documents mean and how they work and how the defendant works and what the defendant's policies ands procedures are and who the defendant's players are, you need people who know that arena.

THE COURT: I don't disagree with that in the abstract, but it can't simply be that you should find against the defendants because it is my opinion based on everything that I know about them that you don't know about them that they must have done this.

MR. YALOWITZ: No, that is not useful expert testimony.

THE COURT: If you want to, it might be helpful if you think these witnesses testified in front of Judge Cogan on similar issues, let me see the transcript, highlight the portions that they testified about, and I can look at it directly if you think they gave similar relevant testimony.

MR. HILL: None of that testimony is relevant because it wasn't about AAMB. In fact, Dr. Levitt has never been qualified as an expert in the AAMB. He hasn't done any academic work in this area. He is independently not qualified to opine about that issue separate and apart from whether he is just reciting hearsay.

MR. HORTON: I disagree with what Mr. Hill just said. We understand what you say. We will govern ourselves accordingly.

THE COURT: Let me go back to your briefs, and let me look at the arguments.

MR. HILL: If you look at Dr. Levitt's report, for example, he has an eight-page section of his qualifications, and the words "Al Aqsa Martyrs Brigades" and "Fatah" never appear.

THE COURT: I have not had a chance to look at any of the expert reports, so that's going to be helpful for me to do that.

Okay. I think we have exhausted more than one court reporter. Let's adjourn.

We're scheduled now for January 6th. I will see you on January 6th.

MR. HILL: I don't think we have a start time, your Honor.

THE COURT: Let's do 11:00 on the 6th unless I hear from you or the circuit before then.

Have a happy holiday, and I will see you then. I will wait to hear whatever further submissions by letter you want to send to me.

(Adjourned)